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JURISPRUDENCE OF MEDICINE

IN ITS RELATIONS TO THE

Law of Contracts, Torts, and Evidence,

WITH A SUPPLEMENT ON

THE LIABILITIES OF VENDORS OF DRUGS.

BY

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"*Potius ignoratio Juris litigiosa est quam scientia.*"—CICERO DE LEGIBUS.

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BOSTON UNIVERSITY
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TO

WILLIAM E. CURTIS, LL.D.,

LATE PRESIDENT OF THE BOARD OF EDUCATION OF THE CITY OF NEW YORK,

This Work is inscribed

IN APPRECIATION OF HIS ATTAINMENTS AND INTEGRITY AS A JURISCONSULT;
OF HIS VARIED AND CRITICAL CULTURE AS A SCHOLAR; AND
OF THOSE UNOBTRUSIVE GRACES OF CHARACTER WHICH
CONSTITUTE TRUE MORAL GREATNESS.

PREFACE.

The law of consensual obligations is one upon which so much has been written, that it might seem little else than supererogatory to discuss anew any chapter in it. But experience constantly demonstrates the fact that, while ponderous treatises majestically absorb the territory of particular sciences, they do not necessarily glean the entire harvest which it is capable of affording. Following in the track of even the most accomplished reaper, some few unobserved heads of wheat may be found, out of which to form still another sheaf. Nor, because humble in size, or unpretending in character, does it follow that it may not add something to those stores out of which the human mind may be fed.

Having often been consulted by physicians in relation to their professional rights at law, and being compelled, in verification of my opinions, to search for precedents, or, in the absence of recorded adjudications, to seek for analogies outside of any works on the positive law of contracts, I became long ago convinced that there existed a definite and well-marked branch of the department of obligations, upon which no systematic collection or expo-

sition of principles had yet appeared, in the form of a distinct treatise. This neglected chapter in the law of mandates, treating of the rights, remedies, and liabilities of an entire profession, as parties to consensual obligations relating to the rendition of personal services, I have undertaken to fashion into a legal entity, by bringing it under the light of positive law, both ancient and modern. In the discharge of this self-imposed duty, I have recognized the reciprocal claims of both Law and Medicine to a discussion of the subject within the boundaries of practical and perfect, rather than theoretical and imperfect obligation, endeavoring also to vindicate the deductions arrived at by the most authoritative adjudications. Nothing less than this would have met the necessity it was meant to supply. And with this end constantly in view, I have narrowed my discussions of principles in every instance, and so far as the nature of the subject would permit, down to the closest interpretation consistent with a logical exegesis of their essential features.

In the department of Medical Evidence, it has been difficult to unfold the subject in as systematic a form as would be desirable; but when it is remembered that skilled testimony at common law is, from its inherent attributes, a paradox in the law of evidence, it will more readily be understood why any discussion of it must necessarily carry us outside the domain of positive jurisprudence into that of legal philosophy. Something must be conceded, also, on account of the very loose state of the

law on this vexed question, since had there been more unanimity, or even a nearer approach to concurrence in views on the part of courts, my task would have been correspondingly easier. Under existing conflicts of opinion, I have felt authorized to apply the best rules of legal philosophy at my command, conscious that, with no arrogant assumption of critical superiority, I might still be able to point out some middle path *in aliud*, where, without radically overthrowing a principle settled by adjudication, we could modify its application *in melius*. It is in this spirit that not only the above chapter, but the entire work, has been undertaken, for at best its discussions involve too many inchoate doctrines to enable them to aspire to a textual character, and the most I venture to claim for them is the effort to illumine a pathway of civil obligation hitherto neglected, and therefore unknown.

Of the *Jurisprudence of Pharmacy*, as collateral to that of medicine, it is much to be regretted that so little can be found among the adjudications of our courts. The subject presents a most important problem in the tripartite relations existing at times between pharmaceutists, physicians, and the public, and certainly as a branch of the law of mandates, malpractice in it merits as high a grade in our penal statutes as a similar wrong in the domain of practical medicine. Yet nothing is more conspicuous in the history of our legislation than the continuous oversight committed in this direction, and the conse-

quent necessity imposed upon courts, in actions for torts committed by pharmaceutists, of searching in the fields of analogy for precedents by which to bring these innominate wrongs within the limits of their penal jurisdiction. Under so elastic a system as that of the common law, it can not be necessary to invent a fiction for the purpose of establishing the principle, that, the duties arising from consensual obligations are not exclusively private in their nature, and limited *ex vi termini* to the contracting parties alone, but that postulate to this fact are the exoteric duties which every individual owes to society at large, in proportion as his acts directly influence the life, health, property or reputation of his fellow beings. Measured by this standard of necessary law, the idea of duty rises into something of more positive consequence than a simple moral obligation, and we are brought to the recognition of a class of duties which, although associated with contracts, ante-date them in fact, arising as they do, not from any privity between parties, but by operation of law, and remaining therefore of ever-binding obligation, whatever may be the nature of the contract itself. Whenever these principles shall be generally understood by legislators, they will hasten to provide means for securing their enforcement, and thus simplify the duties of courts in passing judgment upon the liabilities of vendors of drugs.

In a work written to meet the wants of both professions of law and medicine, it has been next to impossible not to carry the discussion of many principles beyond that

point where, in a happy syncretism of both sciences, I could be easily followed by practitioners of either. Conscious at the outset how inevitably this must happen, I have at least endeavored to reduce the number of its occurrences to the fewest possible; and for this purpose have often compressed the discussion of important legal principles within limits stripping them of all argumentative development, and substituting for it such bald terms as might seem to savor of dogmatism. But the nature of the undertaking left me no other course to pursue, since what has been said in reference to legal principles will also apply with equal force to medical subjects.

In avoiding, therefore, any amplification of topics in directions where possibly a wider argument might have been justifiable, I have sought to combine precision with brevity, by generally selecting the analytical form of syllogism, and supporting conclusions of law by the reasons on which they synthetically rest. Much verbiage is thus escaped, and the subject divested of all necessity for circumlocution, by presenting it in its baldest and most striking outlines. And as I have always conceived this to be the best form in which the essence of a legal principle can be stated, I have accordingly pre-ordinated it to the inferior claims of external expression, leaving these to be met and answered by readers who will naturally supply the omitted steps for themselves.

J. O.

Roslyn, N. Y., *June*, 1869.

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PART FIRST.

RIGHTS, REMEDIES AND LIABILITIES OF PHYSICIANS.

CHAPTER I.

LEGAL STATUS OF PHYSICIANS.

§ 1. The relations of civil society impose obligations upon its members which are necessary for their mutual protection and well-being. These obligations, although at times unequal in extent, are yet always so far reciprocal in character as to require that each party in every transaction should bring to its accomplishment a share, more or less great, of personal and legal responsibility. Wherever, therefore, there is mutuality of benefit there is mutuality of responsibility; nor does it matter what the specific contribution of either party may be, whether in time, money, or skill, provided always it constitutes, when measured by established usage, a fair and just return for the capital advanced, or the service rendered. The foundation of the mutuality of obligation subsisting between men in civil society rests upon the doctrine that each member has rights of which he can not, with propriety, be divested; and that, in the exercise of those rights, and in the ordinary transactions of every-day life,

he is entitled to a *quid pro quo* for every advantage, privilege or favor granted to another. Justice, when abstractly considered, ignores charity, and *compels* no man to the performance of any act for which a moving consideration or advantage to him has not existed, or will not exist in the future. The whole circle of civil obligations as contradistinguished from natural or imperfect ones may be expressed by the simple maxims of *do ut des, vel facio ut facias.*

§ 2. In ordinary commercial transactions, implying either the purchase, sale, or transfer of property, the execution of mechanical works, or the carriage and delivery of goods, the obligations of parties in interest generally assume the character of express contracts regulated by current market prices and usages relating to time and mode of execution; but in the learned professions, other elements enter into the spirit of obligation arising from their practice, and act as moving considerations to the rendition of the particular service in question. While in the former cases tangible and material products constitute the basis of the transaction, in the latter, intangible and immaterial products are the sole exponents of the capital invested. And, inasmuch as skill and judgment form the true capital of a professional man, while his counsel and services are its immaterial fruits, consumed in their very production, it follows that professional services, into which more or less of these qualities must inevitably enter, can never be considered as purely commercial transactions. They are far higher in their nature and consequences than any transactions relating merely to tangible materialities, and have always been regarded among civilized nations as not amenable to any similar standards of value.

§ 3. In legal acceptation, the idea embraced in the term art or profession is that of some uncommon and exceptional attainment possessed by a few, distinguishing them from the many, and securing to them *quoad hoc*, an exclusive advantage or prerogative in the exercise of this special faculty. The aggregation of such persons from similarity of attainments or pursuits into classes, constitutes those learned corporations termed professions or arts; and the designation lawyer, physician, apothecary, engineer, &c., exactly expresses that idea of special acquirement which finds its highest illustration in a scientific calling. These callings form, doubtless, distinctions of an artificial character among men, yet they are distinctions founded in the necessities of civil society for a distribution of its labors. And, since natural reason makes no provision for those special conditions of estate which classify men living under forms of government, we can not revert to it for information touching the myriad conditions into which a complex system of civilization distributes mankind. All are by nature laymen and apprentices, since *nemo nascitur artifex*, and the term *clerk*,[1] (*clericus*,) is the expression of a civilization already recognizing rank as the abstract heritage of the educated mind, and the insignia of an indisputable leading class. Finding no basis for professional prerogative or fiduciary relations in the law of nature, we are driven to seek for them in positive, institutional law, that law which is the offspring of human enactment. It is in the rules of this system as expressed in repeated adjudications, and thus passed into

[1] The force of this idea, now grown imperceptible in the popular diffusion of knowledge, is well illustrated by the ancient doctrine of *benefit of clergy*, whereby special immunities from legal penalties were extended to all who could read, such persons being, in contemplation of law, *clerici*, or clergymen. Black's Comm. lib. 4, cap. 28.

the current of general jurisprudence, that we shall find all the light necessary for our instruction. The common law, with its habitual regard for the widest freedom of action, has always permitted the most unrestricted exercise of any profession, imparting to it, in that sense, no special dignity of character, but leaving to its practitioners the duty of maintaining its sanctions. In the celebrated case of Dr. Bonham, Lord Coke made a fierce assault upon the patent of King Henry VIII., creating the College of Physicians, as against common right, because it gave both judicial and ministerial functions to its censors.[1] It was a very plain infraction of the 29th chapter of Magna Charta, guaranteeing to every person within the realm trial by his peers, and according to the law of the land. And this common law principle has been so often reaffirmed as to require no further discussion. Nothing can be better settled.

§ 4. But, although the door to professional occupations is left open to all, a corresponding responsibility is attached to the manner in which particular services are rendered by persons assuming to be practitioners of any art. They virtually promise, by the very fact of announcing themselves to be willing to undertake any particular service, to bring to its discharge all the qualifications essential to that purpose. Hence skill, diligence, and faithful performance of duty are requisite elements to the rendition of professional services in a legal manner. All of them must be present in some degree, and none in lower measure than accords with the average standard of

[1] "And it appears in our books that in many cases the common law will control acts of Parliament, and sometimes adjudge them to be utterly void, for, when an act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will control it, and adjudge such act to be void." 8 Coke, 375.

the profession practiced. For such deficiency, whenever present, constitutes a fraud as towards the employer, since he covenants for that measure of proficiency which is impliedly possessed by every one announcing himself to be a practitioner in any profession. From these obligations there is no escape. The contract in fact rests upon the manner in which the service is rendered, for nothing is plainer than that he who can not properly discharge a duty which he has voluntarily undertaken, shall derive no advantage from his own malfeasance.[1] While, as a corollary to this, he is further responsible in damages for all the ill consequences of his own professional imperfections in discharging such duty.

LEGAL DEFINITION OF PHYSICIANS.

§ 5. In England there are three orders in the medical profession, viz., *physicians*, *surgeons*, and *apothecaries*. These orders are the creatures of statutory[2] enactments, defining and prescribing the qualifications, rights, duties and liabilities of such corporate bodies and their members, as also the limits within[3] which their franchise may be

[1] Duncan *v.* Blundell, 3 Starkie, 6.

[2] The earliest statute relating to the medical profession is a Draft of an Act of Parliament, 9 Hen. V., A. D. 1422, in which it is recited that "no one shall use the mysterie of fysyk unless he hath studied it in some university, and is at least a bachelor in that science. And if any one practice contrary to this regulation, he shall forfeit £40 and be imprisoned."

Of other statutes, relating to the same subject, may be mentioned Rot. 32, Henry VI.; Canon of Council of Lateran; 19th Henry VII., cap. 7; 3d Henry VIII., cap. 11; 14th Henry VIII., cap. 5; 32d Henry VIII., cap. 40. These are the leading and most important charters, of which the succeeding are generally confirmations, with, in some cases, new grants: 1 Mary, Sess. 2, cap. 9; Chart. 7 Elizabeth; 3 Jac. I., cap. 5; 10 Geo. IV., cap. 7.

[3] Physicians of the College of London may practice in that city and seven

exercised. In the United States, these distinctions do not obtain, being considered as essentially opposed to that spirit of the common law which favors the right of every man to practice in any profession or business in which he is competent. And medicine being regarded by it as an honorific profession, no apprenticeship was required, but the practitioner always prescribed at his peril. This doctrine was essentially borrowed from the civil law, where no barriers were drawn around either professions of law or medicine. Any one who pleased might practice them without any previous qualification, subject always to responsibility for injuries inflicted upon others. "*À Rome*," says Montesquien, "*s'ingérait de la medecine qui voulait;* mais parmi nous les medecins sont obligés de faire des études, et de prendre certains grades; ils sont donc censés connaitre leur art."[1]

§ 6. In the absence of any statutes, therefore, limiting the common law right to practice medicine inherent in every person, the term *physician* may be applied to any one who publicly announces himself to be a practitioner of this art, and undertakes to treat the sick either for or without reward. It is plain that at common law no distinctions can be made between systems or schools of medicine, and consequently none between those practicing under them. Every one undertaking to treat the sick professionally, and as the exercise of his vocation is,

miles around it; while licentiates of Oxford or Cambridge may practice throughout England and Wales, but not in London. Willcocks on Medical Profession.

[1] Esprit des Lois, liv. 29, ch. 14. Il est même assez vraisemblable que ceux, qu 'on a qualifiés les premiers du nom de *medecins*, ont été principalement redevables de ce titre aux connaissances qu 'ils avaient en chirurgie. Goguet. Origine des Lois, vol. 1, 216.

legally, a physician.[1] He has the rights of one, and together with those rights assumes the burdens and responsibilities of that position in which he has voluntarily placed himself. It is of course otherwise if any statute prescribes particular qualifications for the practice of a profession, and one undertakes to discharge its duties without such qualifications. For, in the latter case he is doubly a wrong-doer; first, as against the statute, and, second, as against the public, which has a right to demand in him the ordinary proficiency of his profession. But codes of ethics alone impose no legal obligation upon citizens at large to abstain from practicing particular professions. They are not statutes of legislative enactment, and courts can take no official cognizance of them. While they are to a certain extent useful within the circle of accredited professional membership, they certainly have no authority beyond it, for no attribute of sovereignty attaches itself to them, being at most only conventional agreements, creating moral and not legal obligations.

§ 7. These principles are well elucidated by Judge Daly of the New York Court of Common Pleas, in a case involving the question of what constituted a "*physician*," in legal signification. The following is the substance of his opinion:

"In the absence of special statutes, the law does not exclusively recognize any particular system of medicine, or class of medical practitioners. The statutory regulations formerly in force in the State of New York, requiring as a condition to the right of recovery for medical services, an attendance upon lectures, an examination before a medical board, and a certificate from an organized association, are repealed.

[1] Proof that one practices as a physician is *prima facie* evidence of his professional character. Sutton *v.* Tracy, 1 Mich. 243.

"The repealing act (Session Laws, 1844, cap. 275, p. 406) expressly permits any person to practice physic, subject to punishment as for a misdemeanor, if convicted of gross ignorance, malpractice, or immoral conduct.

"Medicine is a progressive rather than an exact science, and in determining the legal significance of the word 'physician' or 'doctor,' when used in a contract, the term must be held to mean any person who makes it his regular business to practice physic.

"Accordingly, where an agreement of employment between an opera director and a vocalist provided for a forfeiture of a month's salary in case the latter should fail to attend at any stated performance, except in the event of sickness, certified to by a doctor, to be appointed by the director, held that the provision was binding upon the artist, although the director appointed a person in the practice of what is known as the homeopathic system of medicine.

"In adverting to the conflicting views and differences of opinion that exist and have ever existed in the practice of the healing art, it is not to call in question the value of learned, skilful, and experienced physicians, but merely to show the error of attempting, in the present state of medical science, to recognize, as matter of law, any one system of practice, or of declaring that the practitioner who follows a particular system is a doctor, and that one who pursues a different method is not."[1]

And in another case it was said: "Before the statute upon the subject, proof of his having practiced for several years with success and reputation will establish the fact of the plaintiff's being a physician."[2]

§ 8. But whatever may be the school or system of

[1] Corsi *v.* Maretzek, 4 E. D. Smith, 1.

[2] Brown *v.* Mims, 2 Rep. Con. Ct. 235.

medicine to which a physician belongs, the law presumes consistency between his profession and his practice.[1] For, where there are different schools of practice, all that any physician undertakes is, that he understands and will faithfully treat the case, according to the recognized law and rules of his own particular school.[2] This doctrine is essential to the protection of his rights, as it is of those of his employer. Hence, if one employ a homeopathic or botanic physician, or any other reformer in medicine, knowing him to be such, he can not traverse his claim for services rendered with the plea that such services were rendered in a different way from what was expected of him, or is adopted by orthodox practitioners. He is bound by his own choice. And contrariwise, if a practitioner of one school of medicine, being employed through predilection for that system by any person, treat him according to a different and opposite system, either with or without his consent first had and obtained, he inferentially admits his want of that ordinary skill belonging to his calling, and thus perpetrates a fraud upon the public. Should he fail to benefit the patient, the evidence of this duplicity and ignorance would certainly destroy all right to recover for his services.[3]

[1] A physician is expected to practice according to his professed and avowed system. Bowman *v.* Woods, 1 Iowa, 441.

[2] Patten *v.* Wiggin, 51 Maine, 594.

[3] The ancient Egyptians were not only believers in, but enforcers of, this doctrine of consistency, which was evidently part of the law of the land. "For the physicians have a public stipend, and make use of receipts *prescribed by the law*, made up by the ancient physicians. And if they can not cure the patient by them, they are never blamed. But if they use other medicines, they are to suffer death, inasmuch as the lawgiver appointed such receipts for cure as were approved by the most learned doctors, such as by long experience had been found effectual." Diodorus Siculus, lib. 1, cap. 6.

CHAPTER II.

CONTRACT BETWEEN PHYSICIANS AND PATIENTS, ITS NATURE, PREREQUISITES AND OBLIGATIONS.

§ 9. The character of a professional service, whether in law or medicine is that of a mandate, and the obligations incurred under it, when no special contract has been entered into by the parties, belong to that class termed in the civil law *quasi ex contractu*. A mandate was in its nature always gratuitous, being founded in personal confidence. In this respect it differed from all other consensual contracts. *Mandatum nisi gratuitum, nullum est.*[1] This is its very essence, for, if any compensation, either actual or prospective, enters into it, the contract would pass into one of hire. Yet if there was a mere honorary payment expected, not, strictly speaking as a compensation, but as a tribute of respect, the purity of the mandate was not affected thereby. *Si remunerandi gratia honor intervenit, erit mandati actio.*[2] This being the mode of reward usually practiced towards lawyers and physicians, the *quiddam honorarium* became always an implied right possessed by them against clients and patients. And this right it will be seen could be enforced by an appropriate action, being considered as outside the sphere of a merely moral or imperfect obligation.

There has, indeed, been some conflict of opinion among authors, as to the true interpretation of the contract subsisting between lawyer and client, physician and patient.

[1] Pothier ad Pandect. lib. 17, tit. 1, n. 15. [2] Ibid.

The exalted character attached by the civil law to this class of services, which it regarded as strictly honorific, was adopted without modification by the common law, while no equal provision was made by this latter to secure a remedy for those services when unremunerated.[1] The view taken by the Roman law belonged to an age when practitioners in either science were limited to men of wealth and leisure, since, in no sense did they practice these callings as the exclusive means of a livelihood. And in the law at least, the very nature of the relation between patron and client raised it above all taint of a mercenary character. But this extreme view of an honorific service was specially modified in the case of physicians, who, in this respect, were placed upon a better legal footing than lawyers. Their remedy could not be questioned by implication from the honorific nature of their employment, and means were furnished them for obtaining compensation without at the same time derogating from the dignity of their calling. A new action based upon the legal fiction of an implied promise, was invented for the purpose of meeting precisely such cases, and it is from overlooking the fact, that the mandate, although in its essence gratuitous, was not, when relating to professional services, necessarily a remediless contract, that some writers have felt constrained to convert it into a *locatio operis* in order to give it a standing in court.

Says Mr. Bell,[2] "under this rule all professional men are comprehended. Their contract is *locatio operarum*, not mandate, and they, as well as smiths, farriers, bleachers and ordinary artists of all kinds, wherever they engage their services for hire, are responsible for the skill

[1] Chorley *v.* Bolcot, 4 Term R. 317.
[2] Comment. Law of Scotland, p. 459.

and art necessary to accomplish safely what they undertake, in so far as ordinary skill and art can accomplish it."

And Judge Bouvier adopts essentially the same view, in the words following:

"Under this rule, all professional men who can recover for their services in an action are included; their contract is *locatio operarum*, and not mandate."[1]

§ 10. On the other hand, a directly opposite view is taken by some of the best civilians who have written in our language. Says Erskine:[2]

"But the honoraries of lawyers and physicians, though they may be sued for without a previous agreement, l. 1, § 1, 10, 12 De Ext. Cogn., do not alter the nature of the contract from mandate to location; because they are, as Stair expresses it, the reward of services, which can receive no proper estimation, and therefore the action by which they are recovered is the *actio mandati*, not locati."

And before him, Stair[3] thus expressed himself: "Yet honoraries or salaries for performing of things having no proper price or estimation, alter not the nature of this contract; as the salaries or honoraries of physicians for procuring of health, which hath no price, or of judges or advocates for giving or procuring of justice."

These views are further confirmed by a late, and most critical writer, as follows:

"But if there be a remuneration given or promised by way of honorarium, the contract is still mandate; such a remuneration differs from a hire, inasmuch as it is not an

[1] Bouvier's Inst. vol. 1, § 1004–5.
[2] Insts. book 3, tit. 3, § 32.
[3] Stair's Inst. book 1, tit. 12, § 5.

equivalent for the estimated value of the services, and it is merely collateral to the services rendered."[1]

§ 11. It is true that the mandatary could not sue in an action *mandati*, because the implied promise of a reward was not considered an integral part of the contract. All rights and all remedies flowing out of a professional mandate, became, therefore, essentially modified by the original nature of the services rendered. Hence, though in strictness of construction gratuitous, because voluntary,[2] there was nevertheless created a right to the recovery of a reward by an action *extra ordinem*. The payment of the *honorarium* could only be enforced *per persecutionem extraordinariam*, a form of action to which our common law action of assumpsit, with its *quantum meruit* count closely responds. And, although an exception to the strictly gratuitous character of a mandate was made in behalf of physicians, still they had no *actio ex locato*, and were compelled to resort to the form above stated.[3] The fact can never be winked out of sight that even with the most utopian notions of the honor of a liberal profession, which any mention of a salary *eo nomine* would soil and disgrace, it was an established fiction of the civil law that the promise of an honorarium had always accompanied the mandate, and which promise created one of those obligations giving rise to an action *quasi ex contractu*.[4]

§ 12. But in our day, the increase in the number of professional practitioners, and their exclusive devotion to a special class of services as a means of living, has essentially modified the practical character of the contract with

[1] Bowyer's Modern Civil Law, p. 232.

[2] Mandatum non suscipere cuilibet liberum est. Inst. lib. 3, 26, 11.

[3] De Salario autem quod promisit, apud praesidem Provinciæ, cognitio praebebitur. Code, l. 4, tit. 35, § 1.

[4] 3 Ortolan, Explicat. des Instituts. § 1199, "tit. Des Obligations."

their patrons. Although in legal acceptation still a mandate, yet from force of circumstances belonging to an altered state of society, the mandate is practically changed into a contract of hire, (locatio operis). This, doubtless, *reduces professions to the status of artisanship,* and places them on a par with manual labor conjoined to the special skill of a particular calling. But it also simplifies the contract, removes it from the category of innominate, or imperfect obligations requiring the intervention of legal fictions to furnish a means for their enforcement, and brings it directly within the pale of consensual agreements based upon a sufficient consideration. Failure in either party to perform his share of the agreement, relieves the other of his analogous obligation, while, if any damage has accrued to the mandator from any malfeasance on the part of the mandatary, he has his right of action against him for the wrongs inflicted.

NON-OBLIGATION TO PRACTICE PROMISCUOUSLY.

§ 13. There is plainly no principle by which it is made incumbent upon physicians to attend upon whomsoever calls for their services, and thus to assume *nolens volens* the care of any case which offers itself. Indeed, the principle of a mandate would be violated by associating with it any idea of a compulsory rendition of services; and the language of the civil law is precise and conclusive upon this point. "Every one is free to refuse accepting a mandate, but if it is once accepted, it must be executed, or else renounced soon enough to permit the mandator executing it himself, or through another."[1] Again, phy-

[1] Mandatum non suscipere cuilibet liberum est, susceptum autem consummendum est, aut quam primum renunciandum, ut per semetipsum aut per alium, eandem rem mandator exequator. Inst. lib. 3, 26, 11.

sicians are not common carriers, nor publicans, and the law requires no such absolute compliance with the demands of the public. They have their choice, therefore, to accept or refuse the call, but having accepted, must continue in attendance upon the case until recovery, unless dismissed by the patient or the party employing them, or they may withdraw from it themselves, provided they give reasonable notice of such intention, so that another medical attendant may be secured.[1] Their service is always voluntary at its inception, but having once undertaken to treat the case, they are under legal obligation to exert their best skill, and all necessary diligence to carry it to a speedy and successful termination.

Pothier[2] unfolds the principle upon which this obligation of fidelity in the discharge of an accepted trust rests, in the following lucid and succinct manner:

"Le contrat de mandat est de la classe des contrats consensuels; il se forme et il reçoit sa perfection par le seul consentement des parties. Aussitot que le mandataire a consenti de se charger de l'affaire dont le mandant l'a chargé, quoi qu'il ne soit encore intervenu aucun fait de part ni d'autre, le mandataire est dès lors obligé à gérer l'affairé dont il s'est chargé, et le mandant contracte l'obligation de l'indemniser de ce qui lui en coutera."

§ 14. The physician, as before said, may, nevertheless, withdraw from the case *after due notice given*, but cannot abandon it without; since this would constitute negligence of a grave character, and render him amenable for all injuries sustained by the patient in consequence thereof. The

[1] Les medecins qui ont commencé le traitement d'une maladie, sont tenus de le continuer tant qu'elle dure, a moins qu'ils n aient une excuse légitime pour s'en dispenser. MERLIN, Repert. de Jurisp. tit. *Medecin*, § 3, 2.

[2] Du Contrat de Mandat, ch. 1, § 4.

contract is for the performance of a service of indefinite duration, and usually without stipulation for its continuance during any particular period. In its essence it is an entirety without limitation as to time of performance. It is true that either party may, at any time interrupt its continuance, with this proviso only, that the physician must give reasonable notice of such intention, while the patient need give none. The mandator is always the principal in the transaction, and may dismiss the mandatary at any moment *sua sponte*, while the latter having accepted the mandate is bound to carry it out if possible, and can only absolve himself by due notice previously given to his principal. It is plainly a fraud upon the mandator to abandon or to neglect discharging the trust after having accepted it, for the acceptance constitutes a promise, and a promise is a good foundation upon which to rest a legal obligation. If the mandatary retires from it, he can only do so by placing the mandator in as good circumstances as he found him, and by giving due notice of his intention.

§ 15. But where a *special* contract is made with a physician, either by a public institution or private individual, to render professional services during a definite period and for a stated sum, so long as he continues able and willing to, and actually does render such services in a proper manner, he cannot be legally discharged before the natural expiration of the contract.[1] The obligation to continue to employ during a fixed period is, by the very terms of the mandator's agreement, binding upon him so long as the mandatary faithfully discharges his duties.

On the other hand, stipulations exacted by a physician from a patient before, or in the course of treatment, to

[1] McDaniel *v.* Yuba Co. 14 Cal. 444.

pay a certain sum contingent upon the performance of a cure, have always been considered as professionally immoral, and in the civil law were repudiated as against public policy. "*Et patimur accipere quæ sani offerunt pro obsequiis, non ea quæ periclitantes pro salute promittunt,*" (Code. Leg. de Prof. et Med.). It is doubtful whether the common law would adopt so ethical a view of human relations into the sphere of perfect obligations, and thus provide remedies against their violation. Certainly we have been able to find no decisions interfering with the right of physicians to make bargains with their patients in the nature of special contracts, at any time while attending upon them.

§ 16. In general, however, the contract between physician and patient belongs to the class of ordinary mandates, and is subject to the rules of interpretation applicable to such cases. When, however, he enters into a special contract to perform a cure, he will be held strictly to its terms, as in any other transaction of life, nor will he be allowed to plead circumstances which, under the general law of professional obligation, might fairly exonerate him from blame, for failing of success in the treatment of his patient. And in order to constitute a special agreement it is not necessary that a specific sum should be agreed upon, for it is not the specific sum, so much as the absolute promise to cure, that forms the gist of the contract.[1] In case of a cure, he will be entitled to recover a reasonable compensation, unless that cure is associated with some permanent deformity in the patient, directly traceable to his professional misconduct. In any event, however, he must be able to show a perform-

[1] Mock *v.* Kelly, 3 Alab. 387.

ance of the terms of the contract on his part, and cannot recover for his services unless he does.

In a case of this kind, in Vermont, it was held, that "if a physician commence attending upon a patient under a contract, that if there is no cure, there shall be no pay, he can not recover for his services or medicines, unless he show a performance of the terms of the contract on his part."[1]

§ 17. Where a patient is unable to pay for professional services, and a third party assumes the responsibility of so doing, a special contract arises either in the nature of a guaranty, or of an absolute adoption of the indebtedness. Thus, if A. say to B., "attend upon C., and if he does not pay you, I will," that being a promise to answer for a debt of C., for which C. is also liable, the guarantee is only a collateral undertaking, and under the Statute of Frauds, must be reduced to writing before any recovery at law can be had under it.[2] But if A. say to B., absolutely and unqualifiedly, "attend upon C., and charge the same to me, or I will pay you for such services as you

[1] Smith *v.* Hyde, 19 Vermont, 54.

[2] "The principle is a common one that if the *whole credit* is not given to the person who comes in to answer for another, his undertaking is collateral, and under the Statute of Frauds must be in writing." Ibid.

Leland *v.* Cregin, 1 McCord, 100; Barber *v.* Fox, 2 E. C. L. R. 386; 3 Kent, 123.

A physician who furnishes medicine to and attends upon a pauper can not recover for his services from the overseers of the poor, unless they were bestowed upon their request, or they have subsequently promised to pay. Everts *v.* Adams, 12 Wend. 449.

A town is not liable to pay a physician for his services in attending upon persons sick with a contagious disease, who have ability to make payment themselves, unless he has been employed by the selectmen of the town to attend upon such persons, and it is not sufficient that the services of the physician were performed with their knowledge and assent. Kellogg *v.* St. George, 28 Maine, 255.

may render him," then, the *whole credit* being given to A., no written agreement is necessary, since it becomes absolutely the indebtedness of A.[1] Hence, a request by the defendant to the plaintiff to attend as physician on a third person, and a promise that if he will so attend, the defendant will pay therefor, and the bestowing of such attendance by the plaintiff upon the faith of such request and promise, renders the defendant liable to pay what such attendance is reasonably worth. Though the defendant may, at any time, give notice to the plaintiff that he will not be liable for further services[2]—yet a guaranty, though in writing, and duly executed by the defendant, will be void, unless some consideration moves between him and the plaintiff. When, however, the undertaking is contemporaneous with the original debt, the guarantor is presumed to participate in the original consideration.[3] Nor in relation to *special* contracts between physician and patient must the principle be overlooked that there is a wide distinction between a contract to do a thing which is accidentally, and one which is absolutely impossible. In the latter case, no obligation is created, and the contract is void *ab initio*. *Impossibilium nulla obligatio est.* But in the former, the contract is binding, notwithstanding, as the party undertaking to perform its conditions should have made provision against such contingencies. Every express contract makes him a guarantor, and it is his own fault if he undertake a thing beyond his ability.[4]

[1] Smith on Contracts, 44.

[2] Hanford *v.* Higgins, 1 Bosw. (N. Y. Supr. C.) 441.

[3] Chitty on Contr., 10th Am. Ed., p. 548.

[4] Story on Bailm. 217.

SKILL, A PREREQUISITE OBLIGATION IN THE MANDATARY.

§ 18. That which particularly distinguishes professional services from ordinary mandates, is the quality of special knowledge or skill entering into them. Indeed, this constitutes a condition precedent to their exercise, and is always included by implication within the meaning of the term designating the practitioner of any learned avocation. A lawyer means, legally, a person skilled in the knowledge of the law; a physician, one skilled in the science and art of medicine; and so with all other professions. Hence, it may be stated as a general proposition, that every professional man, being thus specially instructed in some branch of science or art, and publicly announcing himself as a practitioner of the same, impliedly agrees to bring to the discharge of its duties, the *ordinary skill* of his profession, which is the lowest standard of capacity tolerated at law.

This is but an affirmation of the doctrine laid down by Chief Justice Tyndall,[1] and now universally adopted, that

"Every person who enters into a learned profession undertakes to bring to the exercise of it a reasonable degree of care and skill.[2] He does not, if he is an attorney, undertake at all events, to gain the cause; nor does a surgeon undertake that he will perform a cure; nor does the latter undertake to use the highest possible degree of skill, as there may be persons of higher education and greater advantages than himself; but he undertakes to bring a fair, reasonable, and competent degree of skill. And in

[1] Lanphier *v.* Phipos, 8 Carr. & Payne, 478.

[2] The *degree* of skill rises in proportion to the delicacy and difficulty of the service.

an action against him by a patient, the question for the jury is whether the injury complained of must be referred to a want of a proper degree of skill and care in the defendant or not. Hence he is never presumed to engage for extraordinary skill, or for extraordinary diligence and care.

"As a general rule, he who undertakes for a reward to perform any work, is bound to use a degree of diligence, attention and skill, adequate to the performance of his undertaking; that is, to do it according to the rules of the art, *spondet peritiam artis*. And the degree of skill rises in proportion to the value and delicacy of the operation. But he is in no case required to have more than ordinary skill, for he does not engage for more."[1]

§ 19. The practitioner of medicine, whether physician or surgeon, comes legitimately within the purview of this doctrine, and his responsibility will often turn in a great measure upon evidence not only of the possession, but of the exhibition of these indispensable prerequisites to success in any given case. Whenever called to a patient, it becomes his duty to fulfill all these requirements of the fiduciary relation in which he is then placed. Measuring and apportioning the treatment to the case, he is under virtual obligation to do the best he can, under the particular circumstances. And as every case has its own attendant complexion, so there can be no universal standard established, according to which treatment should be invariably administered. Within the general rules included in the foregoing propositions, all forms and methods of practice should find their application, since short of these canons there can be no basis upon which to rest confidence, the first, and most essential element in all

[1] 1 Bouvier's Inst., § 1004–5.

voluntary contracts. That confidence must, in advance of all experience, rest upon belief; and this belief being engendered by the public notice of qualifications implied in a medical degree, and the desire to obtain patronage evinced by soliciting it, the practitioner of medicine becomes a guarantor of his own proficiency to the lowest extent necessary to successfully minister to the sick. In other words, *spondet peritiam artis.*

§ 20. These principles are well unfolded in a recent case in Maine, where it was said that

"Physicians and surgeons who offer themselves to the public as practitioners, impliedly promise thereby that they possess the requisite knowledge and skill to enable them to treat such cases as they undertake with reasonable success.

"This rule does not require the possession of the highest, or even the average skill, knowledge, or experience, but only such as will enable them to treat the case understandingly and safely.

"The law also implies that in the treatment of all cases which they undertake, they will exercise reasonable and ordinary care and diligence.

"They are also bound always to use their best skill and judgment in determining the nature of the malady, and the best mode of treatment, and in all respects to do their best to secure a perfect restoration of their patients to health and soundness.

"But physicians and surgeons do not impliedly warrant the recovery of their patients, and are not liable on account of any failure in that respect, unless through some default of their own duty, as already defined."[1]

§ 21. But, on the other hand, and from the very nature

[1] Patten *v.* Wiggin, 51 Maine, 594.

of the service rendered, he is not, without an *express contract*, considered a warrantor of the good effects of his treatment, nor as stipulating to perform a cure absolutely.[1] For the law of the manifestation of disease is in every system, modified by age, season, constitution, temperament, habits of living, hereditary predisposition and occupation, factors all in the problem of recovery, which greatly complicate the treatment of every case, and over which the physician can have little, if any control.

In a leading case in Ohio, it was held that

"Where one is employed to do an act depending upon the skill of the operator alone, the law implies from the employment an engagement to bring to the work the requisite skill to accomplish it.

"But if the act to be done depend upon the skill of the operator, and of other causes over which he has no control, the law only implies an engagement to employ the usual skill as a means of accomplishing the end, not that the end shall be attained; as a lawyer, by engaging, undertakes to conduct the business in the usual way, not for the judgment of the court, so a physician engages the use of the common skill of his profession in treating

[1] "He never stipulates for success, at all events, and he is never to be tried by the event," per Bell, J., in Leighton *v.* Sargent, 7 N. Hampshire, 460.

A physician contracts to employ the usual skill of his profession; not to cure. Gallaher *v.* Thompson, Wright's O. R. 466.

The law implies a contract on the part of a person who holds himself out as a physician, not that he will cure his patient, but that he will use reasonable professional skill and due diligence to that end. And evidence that a man was called Doctor, that he attended as a surgeon for some time, and assumed the whole direction and treatment of an injured limb, and held consultations in regard to it with other physicians and surgeons, is proper to go to a jury as circumstantial evidence tending to prove that he held himself out as a physician and surgeon. Reynolds *v.* Graves, 3 Wis. 416.

the patient, not to cure, and is only liable if he fail to treat the patient skillfully."

Therefore, as impossibilities are expected from no man, so the physician must treat each case according to circumstances, watching and ministering sedulously to its necessities, yet, at the same time promising no absolute cure, which, it is plain, belongs to a higher power than that of his circumscribed art. Under Providence, his efforts may be successful, but he cannot positively determine that they will, and cannot be made responsible if they do not. The treatment only, is his part in the history of the recovery, the cure is that of the Creator controlling the laws of life everywhere. To promise an absolute cure is to assume arrogantly the possession of powers never delegated to man. Only a weak and vapid intellect will commit so egregious a blunder. Yet if a man choose to do it he may, and having thenceforth entered into an *express* contract he will be held liable for its fulfillment. For it is his own fault if he undertake a thing above his strength.[1]

ORDINARY SKILL.

§ 22. The attempt to define what constitutes that measure of skill, without possession of which no physician is, at law, esteemed competent to practice his profession, has given rise to much controversy and discussion. Strictly speaking, it is not an *absolute*, but a *relative* qualification, and as such, therefore, always subordinated to whatever conventional standard of professional proficiency we may choose to adopt. Like morals, it may vary with times and places, or, if based upon representative intellects, it is clear that the ideal type selected must be one to which

[1] Jones on Bailm. 99; 3 Blackst. Comm. 165.

the majority, rather than the minority of minds approximate. For as the gift of genius is dispensed only to a few persons in each generation, it would be unwise to insist that no man should be deemed competent to practice his profession, unless he rivalled the best masters in it. This would practically recognize the possibility of fabricating genius, and thus ignore it as a special endowment from the Creator. It must be borne in mind that the liberal professions, being essential to the welfare of society, the number of their members will always have to be regulated by the size and varying wants of separate communities. Were only men of genius to be allowed to practice them, the paucity of these would leave the majority of the world without any professional attendants whatever. And if we consider but for a moment the indispensable importance of the medical profession to the life and health of mankind, we can readily see how great would be the injustice of affixing so high a standard of qualification as a condition precedent to its practice, that only a specially endowed intellect could here and there attain unto it. Under such a code of despotic limitation, whole communities would remain without a physician, and be left to drift into forms of sorcery, or blind fatalism, according to the power of reason or religious training of their inhabitants.

§ 23. In order, therefore, to recognize, under an enlightened administration of laws, the essential doctrine of distinctions of rank founded upon superiority of mind, obtaining as well in the medical as in other professions, and to provide at the same time for the universal wants of society, it has been finally determined to consider the least amount of skill compatible with a scientific knowledge of the healing art as sufficient to predicate the ex-

istence of "ordinary skill." Nevertheless, wherever great and extraordinary skill is possessed by an individual causing his employment exclusively on that account, there can be no doubt of his obligation to bestow it to the full measure of his ability, since the exceptional degree of that skill is the moving consideration to his employment, and its recognition is expressed in the superior charges for services, which he is both expected and justified in making.[1]

THE MEDICAL DEGREE A GUARANTEE OF ORDINARY SKILL.

§ 24. The possession of a Medical Degree is so far a guarantee of "ordinary skill," that behind this evidence no contrary allegation will be allowed to go.[2] Yet a degree by itself proves nothing, and a parchment purporting to be a diploma to practice medicine, is not evidence *per se* that the college issuing it is a regularly constituted medical institution.[3] For it may have emanated from a college having no corporate authority to grant degrees in medicine. Or, it may have been improperly obtained. To establish the authority of a diploma given to a physician by a medical college of another State, the existence of the college at the date of the diploma must be proved by producing its act of incorporation.[4] But whenever the character of the diploma, and the mode of obtaining it

[1] For the reasons already given, a man should be held responsible according to what he is actually able to accomplish, or for what he pretends to be able to do. He asks a large price for his services, and gets it, because he is really superior to others in his knowledge and skill, or fraudulently makes those who employ him think that this is the case. Elwell on Malp. p. 24.

[2] Leighton *v.* Sargent, 7 Foster's N. H. R. 470.

[3] Hill *v.* Bodie, 2 Stewt. & Porter, 56.

[4] Hunter *v.* Blount, 27 Georgia, 76.

remain unchallenged, it constitutes *prima facie* evidence of ordinary skill in the possessor.

At this point arises an inquiry, which might give occasion for much acrimonious discussion within the pale of the medical profession, when acting as experts, although it could not legitimately come within the purview of judicial inquiry, and no court could therefore undertake to decide it. It is this: Are the diplomas of all medical schools to be considered of equal value as certificates of ordinary skill in their possessors? Or is there a diversity of rank among such schools representing by analogy diversity of proficiency in their graduates? However much of a Gordian knot this may be to orthodox physicians, none of whom could conscientiously recognize schools of medicine founded upon ultraisms in physical science, it is plain that courts must solve the problem by appealing, not to individual preferences, but to that common source of legal authority, the legislative power, which is the sole parent of all corporate franchises in the state. The fact that courts are bound to take official cognizance of all acts of the legislature until duly abrogated, will prepare us to perceive that they can not discriminate between schools of medicine. For every incorporated school authorized to confer degrees is, at law, the equal of every other similar institution, and judges have no choice allowed them in drawing inferences of ordinary skill, based upon the possession of a diploma of any particular school. As laymen they are certainly not competent to determine between the merits of different schools of practice, and as dispensers of justice equally and to all men, they can not allow their own individual prejudices to infect their opinions. No other course is allowed them but to accept the enactments of the law-making power.

GRATUITOUS SERVICES.

§ 25. Professional services, like all mandates, being necessarily optional at their inception, and it remaining always discretionary with any party to accept or decline rendering them, no action will, in consequence, lie against a mandatary for *nonfeasance*, particularly where no consideration exists for the promise. For, *ex nudo pacto non oritur actio.* But when such services are once undertaken, and their execution actually entered upon, the contract is none the less binding because the mandator alone is to be benefited.[1] While, therefore, a gratuitous bailee can not be compelled to execute what he has simply promised, but not yet begun to perform, since it is at any moment previous to this permitted him to withdraw, no excuse, based upon mere want of consideration, will avail him, in an action for misfeasance in the discharge of a trust he has once undertaken. This subject was very elaborately discussed in Thorne *v.* Deas,[2] where it was held that where A. and B. were joint owners of a vessel, and A. voluntarily undertook to get the vessel insured, but neglected to do so, and the vessel was lost, no action would lie against A. for the non-performance of the promise, though B. sustained damage by the non-feasance, there being no con-

[1] The distinction taken at an early day between *nonfeasance* and *misfeasance* by a mandatary or a *conductor operis*, is founded in the principle that though a person can not be compelled to enter gratuitously upon the business of another, yet when he once takes it upon himself by beginning the work, he becomes responsible for any damages that may arise through his negligence or want of care. Edwards on Bailments, p. 98.

[2] 4 Johns. R. 84; Shiels *v.* Blackburn, 1 H. Blacks. 159.

And it is accordingly generally true with respect to gratuitous contracts, that, for *non*-feasance, even when a party suffers a damage thereby, no action lies; but for *mis*-feasance an action will lie. Broom, Comments. on Common Law, p. 814.

sideration for the promise. Kent, C. J., delivering the judgment of the court, said: "The offer on the part of the defendant to cause insurance to be effected was perfectly voluntary. But the defendant never entered upon the execution of his undertaking, and the action is brought for the *non-feasance*. There is then no just reason to infer from the ancient authorities that such a promise as the one before us is good without showing a consideration."

§ 26. Therefore is it that even without consideration, either present or prospective, if a physician undertakes to perform professional services, and actually enters upon their execution, he becomes immediately responsible for the consequences of his own acts, and for any damages which may ensue to the patient through want of ordinary skill and diligence. "If," says C. J. Kent, in the case above cited, "the party who makes this engagement *enters upon the execution of the business and does it amiss* through the want of due care, by which damage ensues to another party, an action will lie for *misfeasance*."

The rule is also well put in Smith's Mercantile Law, 4th ed., p. 112, in the following words: "But, if he do commence his task, and afterwards be guilty of misconduct in performing it, he will, though unremunerated, be liable for the damage so occasioned; since, by entering upon the business he has prevented the employment of some better qualified person, and the detriment thus occasioned to his principal is a sufficient consideration to uphold an undertaking on his part to act with care and fidelity."

So, in Shiels *v.* Blackburn,[1] which involved the principle of the responsibility of a gratuitous bailee, Heath, J., thus

[1] 1 H. Blacks. 159.

expressed himself: "If a man applies to a surgeon to attend him in a disorder, for a reward, and the surgeon treats him improperly, there is gross negligence, and the surgeon is liable to an action. The surgeon would also be liable for such negligence if he undertook, *gratis*, to attend a sick person, because his situation implies skill in surgery; but if the patient applies to a man of a different employment or occupation for his gratuitous assistance, who either does not exert all his skill, or administers improper remedies, to the best of his ability, such person is not liable."

And, in the same case, Lord Loughborough, C. J., in pronouncing judgment, said: "But if a man gratuitously undertakes to do a thing to the best of his skill, where his situation is such as to imply skill, an omission of that skill is imputable to him as gross negligence."

§ 27. From all these adjudications, which have been repeatedly reaffirmed, and may now be considered as past the domain of just criticism, it may be deduced as a received principle of law, that a physician, though rendering his services gratuitously, as in hospitals, or among the out-door poor, is bound to exhibit the same degree of ordinary skill and diligence in the treatment of a patient, as if he were acting under the incentive of a consideration, or prospective reward. If he undertakes to execute the trust reposed in him, he is bound to do it well, or else he may be compelled to respond in damages to the party injured by his *misfeasance*. It is not the consideration which constitutes the foundation of his responsibility, but the fact that, in voluntarily accepting the mandate, *spondet peritiam artis*, indiscriminately to all. He can not, therefore, apportion his skill, or his diligence to meet the prospective emoluments flowing out of any given case. *Quod*

medicorum est promittunt medici. For, under such distorted principles of legal obligation, the rich alone could bring suits for malpractice, while the poor would be left entirely remediless.[1] There can be no doubt, therefore, that an action upon the case will lie for a misfeasance, in the breach of a trust undertaken voluntarily.

STATUTORY RESTRICTIONS.

§ 28. The essential nature of the contract between physician and patient remains the same, even in the presence of statutory enactments prescribing the qualifications prerequisite in a practitioner; but *the liabilities and loss of right to recover for services rendered*, which such statutes often impose in the nature of penalties, greatly modify the remedies at law of unlicensed physicians. In relation to such persons, every professional act of theirs is tainted with an infraction of the spirit, if not of the letter, of the law, and their rights are correspondingly circumscribed. There is, it is true, a growing tendency in this country to abolish all restrictions upon the practice of the liberal professions, and to throw their doors indiscriminately open to the public. And the knowledge of this as a prejudice, favored by public opinion, has worked irretrievable injury to the profession of medicine, doing more than all things else combined to encourage irregular practitioners. It may be, and is, possibly, already too late to remedy this evil by reviving statutes now extinct, but at all events, in States where they still remain in force, every possible sanction should be given to them as safeguards to the lives and health of communities.

[1] *Vide* Nelson *v.* Macintosh, 1 Starkie, 188; Wilson *v.* Brett, 11 M. & W. 113.

§ 29. Prior to any act repealing former statutes prohibiting unlicensed physicians from recovering a compensation for their services, an unlicensed physician can not maintain an action for medical services rendered, nor for the value of the medicines administered. And after such repealing act has been passed, an action will not lie on a demand for services rendered before its passage.[1] A patent issued by the United States, securing the exclusive right to manufacture and use certain medicines, does not authorize the administration of them, in the character of a practising physician, without conforming to the laws of the State where administered.[2] Nor can he charge for them unless practicing according to the laws of the State.[3] In general, it may be said, in the words of Lord Ellenborough,[4] that "if a person pass himself off as a physician, he must take the character *cum onere*, when he brings an action for visits paid by him as a physician."

§ 30. Where plaintiff, who had been employed by defendant as a physician, sues for the value of his services, and defendant pleads that the plaintiff was not licensed to practice, the burden of proving that he was not so authorized will be on the defendant, he having employed the plaintiff as such.[5] For, whereever a person has employed another as a physician, and is sued by him for services rendered as such, the burden of proving that he was not legally authorized to practice is on the defendant.[6] But where it was not averred or proved that the plaintiff was

[1] Bailey *v.* Mogg, 4 Denio, 60; Warren *v.* Saxby, 12 Vermont, 146. But see, *per contra*, Hewitt *v.* Wilcox, 1 Metc. 154.

[2] Jordan *v.* Overseers of Dayton, 4 Ohio, 295.

[3] Smith *v.* Tracy, 2 Hall Sup. Ct. (N. Y.) R. 465; Thompson *v.* Staats, 15 Wend. 395.

[4] Lipscomb *v.* Holmes, 4 Campb. N. P. 441.

[5] Dickerson *v.* Gordy, 5 Rob. 489.

[6] Prevosty *v.* Nichols, 11 Marlin, 21.

a licensed physician, and the defendant, instead of demurring, pleaded to the merits of the action, held, that it was too late to take this exception on the appeal.[1]

It may be stated, therefore, as a well recognized principle of law, that wherever statutory enactments require special evidence of qualifications in the form of licenses in order to practice medicine, persons practicing as physicians without having been licensed, as required by law, can claim no compensation for their services, since no action will lie on a contract, the consideration of which is prohibited by law, or which originated in the violation of any statute.[2] And that, consequently, all notes given to pay for medical services rendered by an unlicensed physician are void.[3]

[1] Durand *v.* Grimes, 18 Georg. 693.
[2] Ibid.
[3] Jordan *v.* Brewoin & Broggan, 19 Alab. 238.

CHAPTER III.

FEES AND REMEDIES AT LAW.

§ 31. At common law, the services of lawyers and physicians were formerly considered to be in their nature gratuitous,[1] a doctrine derived from the civil law, where the relation subsisting between the parties being founded upon the principle of a mandate, no compensation as such to the mandatary was in contemplation. *Nam originem ex-officio atque amicitia trahit; contrarium ergo est officio merces.*[2] Therefore the term *honorarium*, applied to the reward which a lawyer or physician might receive for his services, expressed very clearly the principle that such a gratuity was not to be regarded in the light of a salary or hire. *Honorarium sumitur etiam pro mercede quæ datur advocatis, professoribus liberalium artium, mensoribus et ceteris qui operam suam non locant, sed beneficio loco præstant.*[3]

Mandatum and *locatio operis* being mutually irreconcilable in the right to recover a reward for services, any attempt to merge the character of the former into that of the latter was repudiated, as tending, practically, to reduce a professional service to a mere commodity having a defi-

[1] 3 Blacks. Comm. 28; Chorley *v.* Bolcott, Exr., 4 Term R. 317.

[2] Digest, XVII. I.

[3] Digest L. Tit. XVI.

There can be no doubt that at one time, both in Scotland as well as in England, physicians' fees were regarded as honoraries, and as not exigible by action except under a special contract. But this principle, inherited from the civil law, has been relaxed to a great extent, so as to meet the necessities of modern society. Stair, 1, 12, 5; Johnstone *v.* Bell, 1716, Morr. Dict. 11,418; Dickson's Law of Evid. Vol. 1, § 393.

nite market value, and typical by analogy for every thing similar, irrespective of the greater or lesser skill displayed by the professional practitioner. On the contrary, the true philosophical interpretation put upon such services was, that each case being *sui generis*, whether in value to the client, or, in extent of required attainment and effort on the part of counsel or physician, all idea of a fixed and invariable salary became impossible, and the honorarium, like the case, must be left to stand upon its own merits. Yet there can be no doubt that both the advocate and physician might recover for their services upon an express promise to pay the honorarium, assumed to have been made, although there was no implied promise arising merely from the fiduciary relation. The action *de extraordinariis cognitionibus* gave the required remedy, for which there was no provision in the action by *formula*.

Blackstone has stated it to be the established law of England[1] that a counsellor can not sustain a suit for his fees, and it has also been repeatedly decided that the practice of medicine is so far a merely honorary employment that a physician can not recover any compensation for his services, but must take what is voluntarily given him.[2]

[1] 3 Blackst. Comm. 28.

[2] Chorley *v.* Bolcott, Exr., 4 Term R. 317.

Under the rulings in this case, it is evident that, in the hierarchy of Medicine, physicians in England have always held a higher rank than surgeons. And Lord Kenyon, C. J., said, "I remember a learned controversy some years ago as to what description of persons were intended by the *medici* at Rome, and it seemed to have been clearly established by Dr. Mead, that, by those, were not meant physicians, but an inferior degree amongst the possessors of that art, such as answer rather to the description of surgeons amongst us; *but at all events it has been understood in this country that the fees of a physician are honorary, and not demandable of right.* And it is much more for the credit and rank of that honorable body, and perhaps for their benefit also, that they should be so considered."

In England, if a medical practitioner passes himself off as a physician,

§ 32. This was a complete imitation of the jurisprudence of Rome, where the legal presumption of the immaculate character of a liberal profession was carried out to a degree of ethical purity which reflects the highest credit upon the civilization of that day. Honor first, last, and always, was the germinal idea associated with the practice of professions, insomuch, that, no ordinary action would lie for an *honorarium*, but the magistrate, prætor, or praeses of the province pronounced *extra ordinem*, and according to the circumstances (*causa cognita*) whether they were justly due, and if so, to what amount.[1] But the Cincian law, "*de donis et muneribus*," which was intended to prevent the perfidy of advocates, several notable instances of which had occurred about that time, went further than the principle of mandatum, for it directly inhibited the reception of any fee or gratuity whatever on the part of a pleader, *qua cavetur antiquitus, nequis ob causam orandam pecuniam donumve accipiat.*[2] A law like this, which was a direct infraction of the personal rights of the citizen, could not evidently endure, and in the reign of Claudius we find it so far modified as to allow advocates to receive any sum up to ten thousand sesterces ($400) for their services.[3] In like manner, physicians and midwives could claim their *honorarium* by the action *extra ordinem*, but no statute fixed the limit of their legal emolu-

although he has no diploma, and no right to assume that character, he can not maintain an action for his fees. Lipscomb *v.* Holmes, 2 Campb. 441.

[1] Est quidem res sanctissima civilis sapientia ; sed quæ pretio nummario non sit æstimanda, nec dehonestanda, dum in judicio honor petitur qui in ingressu sacramenti offeri debuit. *Quædam enim tametsi honeste accipiantur, inhoneste tamen petuntur.* Digest, lib. L., Tit. XIII. "*De Extraordinariis Cognitionibus.*"

[2] Tacitus, Annals. Lib. XI. c. 5.

[3] Capiendis pecuniis posuit modum usque ad dena sestertia, quem egressi repetundarum tenerentur. Ibid. Lib. XI. c. 7.

ments. Large or small, in either case the magistrate was the sole arbiter of its justice. The reason of this distinction was founded upon the superior influence of the bar as a stepping-stone to political preferment, and the increasing fashion of taking bribes, which prevailed among lawyers and official personages. In fact, neither suits nor elections could be carried on without bribes. And the Cincian law was a measure which, while it practically did little good, yet paved the way for that amendment under Claudius recognizing the fact, that, professional services created something more than an imperfect obligation on the part of the recipient, and entitled the practitioner to his *quiddam honorarium* even through the intervention of the magistrate. Such was the high standard affixed to the exercise of a liberal profession among the most polished people of antiquity.

§ 33. These theoretical dogmas, deduced from an age whose social fabric permitted their adoption, and suited to a civilization of less complex relations than our own, have had to give way to the more practical necessities of modern times. The increasing demand for the services of a large body of educated men in both professions of law and medicine, whose lives should be exclusively devoted to the practice of their professions, has pointed out the injustice, as well as the absurdity, of leaving them, as a class, remediless for the value of such services as they may render to the public.[1] Admitting even the honorable character of their employment, as taking the first rank among human occupations, it would be a poor return in

[1] *Vide* Opinion of Senator Verplanck in Adams *v.* Stevens et al., 26 Wendell, 451.

Vide also Merlin, tit. *Honoraires*, where it is stated that although a lawyer in France has a legal right to his fees, yet it is a rule of the bar of Paris to dismiss any member who sues for them.

kind to strip it of those rights which are accorded to the humblest of the mechanial occupations—the right to a *quid pro quo* for services rendered. Were such a principle sanctioned at law, it would follow that only the inferior callings would be protected by courts, and that, consequently, the nobler the profession the less the legal right to any reward for practicing it. The statement of such a proposition is, in itself, a sufficient refutation of its principle, not to require further comment.

Mr. Pothier, with that elegance of statement and perspicuity of logic which distinguishes all his writings, has unfolded the true philosophy of this principle in the words following:

"Il y a neanmoins certains services pour lesquels, quoiqu'ils dépendent d'une profession libérale, et qu 'en conséquence ils appartiennent au contrat de mandat, plutot qu 'au contrat de louage, ceux qui les ont rendus sont réçus en justice à en demander la récompense ordinaire. Tels sont les services que rendent dans leur profession les medecins, les grammairiens, les maitres de philosophie ou de mathematiques, etc.

"L'action qu'ont ces personnes pour demander une récompense de ces services, n'est pas *actio ex locato*, c'est *persecutio extraordinaria*, car cette récompense n'est pas un loyer, ce n'est pas le prix de leurs services, qui sont inestimables de leur nature; elle se regle sur ce qu'il est d'usage le plus communement de donner pour ces services, dans le lieu où ces personnes exercent leur profession." Pothier, Mandat, Oeuvres Tom. 5, ch. 1, § 2, 20.

§ 34. Admitting even that the mandate created only an imperfect obligation in the mandator, and that a mere moral obligation is no ground for an implied promise, the principle is a good one which considers a past service

rendered upon request as a sufficient consideration upon which to found a legal claim. The general rule of an implied undertaking to remunerate another for services rendered upon request, rests upon the broad principle that when a person thus bestows his skill and labor for the benefit of another, and no agreement is made in respect to them, the law raises an implied promise to pay such compensation as the person performing the services deserves to have; and when there is no statutory or other restraint upon the remedy, an action lies on such promise.[1] Hence the principle of the honorarium finds no support in American law, even if it still does in England, and although the right of the physician to sue upon a *quantum meruit*, in an action of assumpsit to recover for his services, virtually reduces his profession to the grade of mere artisanship, it must not be forgotten that the time and money spent by him in obtaining an education are so much capital invested, for which he is justly entitled to receive some return. It is the emolument in the first instance that induces men to undergo the persistent trials and daily fatigues of professional practice, and, as in the case of the physician, to risk health and life in order to save that of another. By parity of reason, since the lawyer has a legal title to his fee-bill, so the physician can, in all the United States, recover for his services, according to their value. "For," says Chancellor Walworth, "whatever may be the practice of other countries, however, the principle never has been adopted in this State, that the professions of physicians and counsellors are merely honorary, and that they are not of right entitled to demand and receive a fair compensation for their services."[2]

[1] Hewitt *v.* Wilcox, 1 Metc. 154, per Shaw, C. J.

[2] Adams *v.* Stevens, 26 Wend. 451.

§ 35. In the absence, therefore, of any statutory enactments limiting the right to practice medicine to such persons only as have pursued a prescribed system of studies, and obtained a degree in course from some duly authorized college, or board of medical examiners; in the absence of any such restrictive statutes, all persons who may choose, are authorized to undertake to administer medicines, and to perform cures, and in such case will be entitled to the rights, privileges and immunities of physicians. Hence the right to sue and recover for one's medical services to whomsoever rendered can no longer be questioned.

On this point Edwards says:—"Wherever services have been performed at the request of another, there is an implied promise raised by law to pay for them what they are worth. Such person may recover upon a *quantum meruit*, the relation being one of contract, express or implied."[1] Nor is it any defence to such a claim that the services were rendered by a person styled an irregular practitioner, or that his mode of practice was not agreeable to the views of the patient. For this latter had his choice whom to employ, and having made his selection he is bound by it, so long as the services continue to be received—*quia aegrotus debet sibi imputare cur talem elegerit.*

§ 36. A physician then, wherever recognized as such, may maintain an action for his fees;[2] and both physicians

[1] Edwards Bailm. 367; 2 Com. on Cont. 378; Peak's N. P. C. 123, 96.

See case of Glover *v.* Le Testue, in Quincy's Massachusetts Reports 1761–72, page 225, n., where in a suit by a physician for visits and medicines, "the Court unanimously adjudged that *indebitatus assumpsit* would not lie upon the account in this case, neither for visits, bleeding, nor medicines, but allowed plaintiff to file a new declaration on *quantum meruit* on payment of costs."

[2] Judah *v.* McNamee, 3 Blackf. 269; McPherson *v.* Chedell, 24 Wend. 15; Adams *v.* Stevens, 26 Wend. 451; Simmons *v.* Means, 8 Sm. & Marsh. 397; Rouse *v.* Morris, 17 Ser. & R. 328; Smith *v.* Watson, 14 Verm. 332;

and surgeons can recover for the services of their students in attendance upon their patients.[1] But in taking charge of a case, and in order to entitle him to recover for services rendered, it is not necessary that a specific price should be expressly agreed upon at the outset by a physician, for he is tacitly presumed to engage for the usual price paid for the like services, at the same place, according to the general custom of his profession, or according to what they are worth there.[2] And in an action to recover for professional services, the plaintiff may support his demand by his book of original entries, and his own oath,[3] and it is not necessary that he should produce his license.[4] In Vermont, the employment of a physician, and a promise to pay him for his services, made on the Sabbath, is not prohibited by statute.[5] Considering the nature of medical services, and the frequent impossibility of deferring them to another day, there can be no doubt of the soundness of this doctrine, nor of its universal adoption; so that the employment of a physician on the Sabbath constitutes a valid contract with him, and his book-charges made on that day are legal and collectable.

§ 37. As to the amount of benefit which must have accrued to the patient in order to entitle the physician to recover for services rendered, some qualifications must be put upon the general principle regulating executory con-

Thompson *v.* Sayre, 1 Denio, 175; Sweet *v.* Hooper, 1 Dane's Ab. 619; Hewitt *v.* Wilcox, 1 Met. 154; Mays *v.* Hogan, 4 Texas, 26; Mooney *v.* Lloyd, 5 Ser. & R. 416.

[1] People *v.* Monroe, 4 Wend. 200.

[2] Story, Bailm. § 375.

[3] 3 Dane's Ab. cap. 81, a. 5, § 16.

[4] McPherson *v.* Chedell, 24 Wend. 15; Thompson *v.* Sayre, 1 Denio, 175. Unless the defendant by plea, or otherwise, has given him reasonable notice so to do; Cram *v.* McLaw, 12 Rich. Law (S. C.) 129.

[5] Smith *v.* Walton, 14 Verm. 332.

tracts. The rule as now settled is, "that if there has been no beneficial service, there shall be no pay, but if some benefit has been derived, though not to the extent expected, this shall go to the amount of the plaintiff's demand, leaving the defendant to his action for negligence.[1] But it must be remembered that the physician is not a guarantor, without a special contract, of the good effects of his own treatment; and he only undertakes to do what can ordinarily be done under similar circumstances. If the good effects of his treatment, and the consequent value of his services be disputed, he must be prepared to show that his labor was performed with the ordinary skill, and in the ordinary way of his profession. This is all the essential evidence upon which to found his case. And he will be required to prove nothing more, since the whole issue turns upon this.

In Basten *v.* Butter,[2] which was an action founded upon a *quantum meruit* for work and labor done, Le Blanc, J., said: "I think that, in either case the plaintiff must be prepared to show that his work was properly done, if that be disputed, in order to prove that he is entitled to his reward; otherwise, he has not performed that which he undertook to do, and the consideration fails. And I think it is competent to the defendant to enter into such a defence, as well when the agreement is to do the work for such a man, as where it is general to do such a work. If a man contracted with another to build him a house for a certain sum, it surely would not be sufficient for the plaintiff to show that he had put together such a quantity of brick and timber in the shape of a house, if it could be shown that it fell down next day; but he ought to be

[1] Farnsworth *v.* Garrard, 1 Campb. 39.
[2] 7 East, 479.

prepared to show that he had done the stipulated work according to his contract. And it is open to the defendant to prove that it was executed in such a manner as to be of no value at all to him, or not to be of the value claimed."

§ 38. Yet there must be some relation between skill and its application in a given case; and the profession of the former in adequate measure, must be accompanied by the use of such means as will best subserve the intended purpose of accomplishing a cure. This latter is the moving consideration to the contract on the part of the mandator, and while on the other hand, the mandatary does not guarantee it absolutely, he yet impliedly covenants to use all ordinary means to promote its occurrence.

Hence, if a physician ignorantly and unskillfully administers improper medicines, and the patient, consequently, derives no benefit from his attendance, the physician is not entitled to any remuneration for what he has done; but if he has employed the ordinary degree of skill of his profession, and has applied remedies fitted to the complaint and calculated to do good in general, he is entitled to his hire and reward, although they may have failed in the particular instance, such failure being then attributable to some vice or peculiarity in the constitution of the patient, for which the medical man is not responsible.[1]

§ 39. The law sets no limitation to fees, provided they be reasonable. Within this rule a professional practitioner is allowed discretionary powers, and may charge more or less according to his own estimate of the value of his services. No one will pretend to assert that all services are

[1] Kannan *v.* McMullen, Peake, 83; Hupe *v.* Phelps, 2 Starkie, 424.

In assumpsit by a physician for his services, the defendant cannot prove the professional character of the plaintiff. Jeffries *v.* Harris, 3 Hawks, 105.

of equal value. And no one will claim that those who can render them the most skillfully, should receive only the same reward as those who can render them the least so. There is diversity of rank and talent even among masters, and every man should be rewarded according to the degree of his perfection in his own art. While all physicians are required and do impliedly possess that measure of skill which is sufficient for all the necessities of their profession, some are better able to meet its varying requirements and contingencies than others, and their services, as increasing the prospects of a more speedy or certain recovery in the patient, become proportionally more valuable. Such men have corresponding rights to larger fees, and the law will uphold them in asserting them, whenever disputed. Says Mr. Willcocks, "a medical man of great eminence may be considered reasonably entitled to a larger recompense than one who has not equal practice, after it has become publicly understood that he expects a larger fee; inasmuch as the party applying to him must be taken to have employed him with a knowledge of this circumstance."[1]

§ 40. It is only where an unreasonable and palpably unjust charge is made that Courts will interfere to reduce the claim to a more equitable sum. Says Lord Kenyon, "Though professional men are entitled to a fair and liberal compensation for their assistance, there are certain claims which they affect to set up, which, if unreasonable or improper, it is for the jury to control."[2] What constitutes a fair and liberal compensation is not always easy to de-

[1] On Medical Profession, p. 111.

[2] Tuson *v.* Batting, 3 Esp. N. P. 192. This principle was well exemplified in the following case:—The plaintiff, a surgeon, for several years bestowed surgical attendance upon a lady, but expecting that she would amply compensate him by a legacy, sent in no bill. She died and left him

termine,[1] for custom, character of service, and rank and estate of patient are all elements to be weighed in the solution of this problem. It is not the importance of the service alone which justifies the measure of the reward claimed, for many would be able to give a fair, who could not give a liberal compensation. On the other hand, the possession of a fortune by a patient does not justify extortion in charges made against him. Regard must be had, therefore, to both circumstances; and the character of the service rendered, together with the worldly estate of the patient, should be taken together in computing the limits of a fair and reasonable compensation. This is the rule adopted by the French law,[2] and its soundness cannot be questioned.

§ 41. The physician's account should be specific, and not general, in its charges. It should recite the number of visits, and their date, and correspond in this particular with his account books. Hence a claim for "$13 for medicine and attendance on one of the general's daughters, in curing the whooping-cough," which was sought to be enforced at law, was held to be bad, because too loose to sustain an action.[3] But the original entries in the books of a physician are evidence for him, in actions for the re-

nothing; whereupon he sued her executors, claiming 500*l*. The jury awarded him 250*l*. The Court refused to disturb the verdict. Baxter *v.* Gray, 4 Scott N. R. 374.

[1] What is a reasonable compensation cannot be shown by the opinion of one, not a physician. Mock *v.* Kelly, 3 Alab. 387. But may be by one who is, for it has been held that, in respect to the value of professional services, a member of the profession is to be regarded as an expert. Beekman *v.* Platner, 15 Barb. 550.

[2] On doit avoir égard pour la fixation des mémoires des medecins à la gravité de la maladie, ainsi qu'à la fortune et la qualité du malade. *Affaire Tallien, Jour. du Palais,* vol. 3, An. XI. XII. p. 210.

[3] Hughes *v.* Hampton, Const. Rep. (S. C.) 745.

covery of his medical services, of the items of his account for medicines administered and furnished to his patients in the course of his practice, although the value of the medicines, as well as of the active services rendered, must be otherwise proved.[1] And, in an action for medical services, wherein it is impossible, in most cases, to procure specific and certain evidence of the correctness of each item of the account, and plaintiff must recover, if at all, upon testimony of a general, and somewhat indefinite character, the verdict of a jury, acquainted with the witnesses and parties, is of great weight, and will not be lightly disturbed.[2] Semble, also, that if a surgeon or physician, in a bill to his patient, leave a blank for his charge for attendances, and the patient pays a sum on that account, the former is bound by the bill, and can not recover more than the sum paid into the court by the latter, because by so acting, he considers his demand in the light of a *quiddam honorarium*.[3] But if he send a bill for a certain amount, and its payment be refused, he is not restricted in his right of recovery to the amount charged, provided the services can be shown to be of greater value. Thus, in a recent American case, it was held that "A demand by an attorney upon his client for a certain sum, as a compensation for services rendered, is only a proposition to receive that amount for the debt, and if payment is refused, the recovery can not be limited to the amount demanded, if the services are shown to be of greater value.[4] But the existence of an epidemic does not in itself authorize exorbitant fees. And in determining their amount,

[1] Richardson *v.* Dorman's Exr. 28 Alab. 679.

[2] Newton *v.* Ker, 14 Louis. A. 704.

[3] Tuson *v.* Batting, 3 Esp. N. P. C. 192, and 1 Steph. N. P. 311.

[4] Miller *v.* Beal, 26 Ind. 234 (Am. Law Register, Sept. 1867).

the courts incline to the *lowest estimate* of the witnesses, and where, according to such estimate, a physician is entitled to double the price of a visit in ordinary cases, he can recover only for such a number of visits as he establishes.[1]

§ 42. The number of visits which a physician may make in any given case, and for which he will be justified in charging a reasonable compensation, can not be predetermined. He is the only proper judge of the necessities of the patient in this particular, and may exercise his discretion accordingly. But when frequent, they fall into the class of *ordinary* visits, and can not be considered, nor charged for as *consultations*, even though made at the same time with those of another physician. In a case in Louisiana, it was held, that "When more than one physician is called in, and attends regularly, the visits of each can not rank as a consultation, though made at the same hour, so that the physicians actually meet at the patient's bedside. The difference in charge between a technical and simple visit would make it ruinous to most patients, and unreasonably onerous to all, to avail themselves of the lights of more than one of the faculty in time of need.[2]

§ 43. Where special *fee bills* have been drawn up and acquiesced in by members of any medical organization as the conventional charges of such locality, and particularly where such tariff is conspicuously posted in the office of medical practitioners, they are unquestionably bound by them as towards the public. And, in an action to recover for services rendered by a physician, the defendant may avail himself of such fee bill as a traverse to any charge

[1] Collins *v.* Graves, 13 Louis. A. 95; Villalobos *v.* Mooney, 2 Louis. 331.
[2] Succession of Duclos, 11 Louis. A. 406.

in excess of the stipulations contained in it. As between practitioners themselves, they are only morally bound to an observance of this tariff;[1] but it is otherwise between them and the public. For, while on the general principle of a *quantum meruit*, the practitioner can recover for the particular value of his services so far as that can be ascertained, he is still estopped from claiming more than that price at which he has offered to perform any designated service in his published fee bill. This latter is in effect a notice to the public of the price which the practitioner sets upon his own services, and when, consequently, he assumes to treat any case, or perform any service having a designated value of his own promulgation, that price becomes the consideration of an implied special agreement to perform the duty upon such terms. His fee bill, or tariff, is in the nature of a standing offer to render particular services for a stated compensation, and like all

[1] And in drawing up such tariff, care must be taken that it contain no stipulations contravening public policy, as if a medical society should band itself together to charge extortionate prices, and a patient should employ a member, it is plain that the latter could recover only a reasonable compensation, notwithstanding the tariff, or knowledge of its terms by the patient, for medical services are indispensable to mankind, and it is against public policy that they should be allowed to become a monopoly in any one's hands. In a case in New York, it was held, that "Where a medical society established a tariff of fees for medical services to be performed by its members, and fixed a minimum salary to be received by any member who should be appointed to any public office, in a professional capacity, and adopted a resolution declaring that it should be dishonorable for any member of the society to accept any appointment, or perform any services contained in such tariff of prices, at a less sum than was therein specified; and subsequently, in pursuance of a by-law to that effect, expelled a member for a violation of this regulation, *held*, that the regulation was void, as being unreasonable, and against public policy, and contrary to law; that the expulsion of the member was unauthorized and illegal, and that a mandamus would lie, directing that he be restored, or recognized as a member of the medical society." People ex rel. Gray *v.* Erie Co. Med. Soc. 24 Barb. 570.

such offers when accepted, they are binding upon the party making them.

§ 44. All fees and charges cease to be valid from the moment of the dismissal of the physician by the patient; nor, if he continue to bestow his services, will he be entitled to any compensation, for then they become simply gratuitous. Particularly will this be the case if another practitioner has been called in to take his place, and to whom the contract is therefore transferred with all its rights.[1]

§ 45. Partners in the practice of medicine are placed upon a similar footing with those in trade generally, and in case of death the *jus accrescendi* does not apply to them. "For," says Lord Coke, "the wares, merchandises, debts or duties that they have as joint merchants or partners, shall not survive, but shall go to the executors of him that deceaseth; and this *per legem mercatoriam*, which is part of the laws of this realm for the advancement and continuance of commerce and trade, which is *pro bono publico*, for the rule is that *jus accrescendi inter mercatores pro beneficio commercii locum non habet*."[2] Whatever remains, whether of real or personal estate, must be distributed as partnership property among the legal representatives of the deceased.

§ 46. Physicians are entitled to be paid for attendance previous to the last illness of a deceased insolvent, out of his assets.[3] In Louisiana, a physician's privilege is only

[1] Le mandataire cesse d'avoir droit au salaire promis à partir du jour de sa révocation; il ne peut, alors même qu'il aurait continué à gérer utilement, réclamer un salaire lorsqu'il est constant d'ailleurs, qu'a partir de la révocation, le mandant a payé un salaire à un autre mandataire. Aff Drion, Jour. du Palais, Feb. 1810, vol. 8, p. 131.

[2] 2 Coke Litt. 182, a; Com. Dig. tit. *Merchant;* Collyer on Partnership, § 123; Allen *v.* Blanchard, 9 Cow. 631.

[3] Rouse *v.* Morris, 17 S. & R. 328.

for medicines furnished, and services during the last sickness, and the last sickness is that of which the patient died. But where a wound, received during his illness, was the immediate cause of his death, held, that the physician was not entitled to a privilege for the amount of his bill.[1] In the same State, a physician's bill is prescribed by three years.[2] And his horse is not exempted from seizure.[3]

§ 47. Whenever a physician sends for another to aid him in the treatment of a case, or the performance of an operation, the patient deriving the sole benefit, if any accrue, from the service, is alone liable for the compensation. For it is plain that the physician could make no extra charge on account of the assistance called in, even if such party were his student or agent, much less can he do so in the case of an entire stranger. There arises unquestionably a contract between the new comer and the patient; but it should be shown that this latter had acquiesced in the employment of the former; since a physician in regular attendance upon a case has no right to call in, indiscriminately, one or many assistants at the expense of the patient, without special authority first obtained for that purpose. And a physician newly brought into a case already in the hands of another, whatever services he may render, can not recover for them from his fellow-practitioner, but must look to the party deriving the immediate advantage from such beneficial service.[4]

[1] Succession of Whittaker, 7 Rob. 91.

[2] Arbonneaux *v.* Letorcy, 6 Rob. 456.

[3] Hanna *v.* Bry, 5 Louis. A. 651.

[4] Where A., the plantation physician of a planter, found a surgical operation necessary on one of the negroes, and requested the overseer to send for B., another physician, who came and performed the operation without any

§ 48. But the physician is always allowed *discretionary* powers over the patient entrusted to his care, in modes of treatment, so as to be able to alter them according to the varying necessities of each case. Unless such change of treatment involves a risk to life, or consequences of which he is unwilling to assume the responsibility, he is not under obligation to give notice, or obtain permission before making it. Particularly is this the case where the patient is not at home, and among friends or relatives, but is in some degree in his custody, and under his exclusive supervision, as well as care. In such circumstances he is authorized to perform operations, or change his treatment, or enforce discipline essential to its fulfillment, without first consulting, or obtaining permission from friends or guardians at a distance, since delay might involve a greater risk to the health, and possibly the life, of the patient than would a necessitated operation; and of such things he alone is the proper, as he alone can be the best judge. This point came up and was ably expounded in the Supreme Judicial Court of Massachusetts in 1837, as follows:

"Where the wife of the defendant, being afflicted with a dangerous disease, was carried by him to a distance from his residence, and left under the care of the plaintiff as a surgeon; and after the lapse of some weeks the plaintiff performed an operation on her for the cure of the disease, soon after which she died. It was held, in an action by the plaintiff against the defendant to recover compensation for his services, that the performance of the operation was within the scope of the plaintiff's authority, if, in his judgment it was necessary or expedient; and

assistance from A., it was held that B. could not maintain an action against A. to recover for his services. Guerard *v.* Jenkins, 1 Strobh. 171.

that it was not incumbent on him to prove that it was necessary or proper under the circumstances; or that, before he performed it, he gave notice to the defendant, or that it would have been dangerous to the wife to wait until notice could be given to the defendant."[1]

§ 49. The furnishing of medicines not forming any necessary part of the contract for professional services, nor coming even by implication within its purview, the physician may unquestionably charge for them whenever dispensed. For the general duty of prescribing belonging to the practitioner of medicine does not include supplying the patient with drugs, although practically the successful treatment of the case may turn upon them. It is the business of the patient to furnish them himself, or if he calls upon the physician to do so, the latter has the right to be reimbursed therefor.[2] And charges upon a physician's bill for "visits and medicine" are sufficiently specific, although the quality and quantity of the medicines be not designated, unless it appear that they vary from the usual mode adopted by physicians in making charges. It may be said, also, that a *post mortem* examination is not in the line of a physician's ordinary professional services, and not covered by his employment to attend upon the county poor any more than in his private practice. He may charge therefor, in advance of rendering the service, even though summoned by a coroner to do it, and his bill will

[1] McClallen *v.* Adams, 19 Pick. 333.

[2] Bassett *v.* Spofford, 11 N. H. 167.

In England, by a statutory enactment, the professions of physician and apothecary being distinct, no person can charge for medicines administered, unless he be certificated as an apothecary. Simpson *v.* Ralfe, 4 Tyrw. 325. In the United States, wherever statutes do not make similar distinctions, physicians may both dispense drugs and charge for them when administered.

be a proper claim upon the party employing him, to be enforced at law if necessary.[1]

In Alabama, if a physician sells drugs and medicines, apart from his professional business, he may recover for them; and where they constitute a part of the consideration of a note, the true question to be determined by the jury is, whether such drugs and medicines were prescribed, administered, or furnished by the payee in the capacity of physician, or sold by him as a druggist or apothecary.[2] It is different, however, with *surgical instruments*, *splints*, or other professional paraphernalia which are the necessary adjuncts to the practice of the surgeon's art, and are part of his personal property. Their consumption in the ordinary way, and in the line of his daily duties, is his own loss, and the patients can not be charged with them. But if a special instrument be furnished to a patient for his own exclusive use, as a truss or pessary, &c., or an instrument be so altered to meet a particular case as to destroy its specific value to the surgeon, and render it useful only to the patient, the same may be charged to him as a benefit conferred outside of the professional contract.

§ 50. A physician, where no contrary notice is given to the patient, is presumed to make similar charges for similar services, and to adhere to what has been his customary price in his former treatment of a patient; and the latter, without any new or special contract, must be considered as employing him under this implied and usual compensation. In a suit by a physician for professional services, for which the physician demanded to be paid at

[1] Gaston *v.* Commissioners Marion Co. 3 Ind. 497; County of Northampton *v.* Innes, 26 Penn. 126.

[2] Holland *v.* Adams, 21 Alab. 680.

the rate of one dollar and fifty cents per visit: the defendant offered to prove that before, and at the commencement of the account sued on, the plaintiff had been his family physician, and had charged him for previous and similar services and treatment, including medicines, at rates not lower than fifty cents, nor over one dollar and twenty-five cents per visit, and that no contract was made as to the price to be charged for the services now sued for, held, that such proof was competent, as tending to establish an implied contract as to the prices to be charged for the services sued for.[1] But it is not sufficient evidence to uphold a verdict in favor of a physician for medical services rendered, and medicines supplied the defendant by the plaintiff, that the plaintiff practiced in the family of the defendant, and was seen going and returning from the defendant's house, coupled with proof that the items, as charged, were according to the customary rates; such evidence is not sufficient to create a legal presumption of indebtedness by the defendant.[2]

§ 51. In a suit by a physician against a county, on a contract for services for one year, as examining physician of the hospital, the objection that he is not a graduate of a legally constituted medical institute, if good at all, can not be taken by demurrer, unless the demurrer distinctly present the objection. If, after such a contract, which compels the physician to perform such services only as the supervisors might require, they put it out of his power to render the services, he is still entitled to his salary.[3]

Physicians who contract with a county to attend and

[1] Sidener *v.* Fetter, 19 Ind. 310.

[2] Simmons *v.* Means, 8 Sm. & Marsh. 397.

[3] McDaniel *v.* Yuba Co. 14 Cal. 444.

treat all the inmates of the county infirmary, whether afflicted with contagious diseases or not, and to receive a stipulated price therefor, can not recover any thing beyond the stipulated price for attending persons sick with contagious diseases, and placed in a building apart from the one usually used as a county hospital, by order of the county authorities.[1]

In all suits to recover for the value of services rendered, the facts to be proved are, *employment, skill in the physician, services rendered, and charges at the usual rates.*[2] And in such cases the defendant may plead and show that he did not manage the case skillfully.[3] But a physician will not be entitled to recover of a town of which he is not a resident, for medical services rendered to its inhabitants while sick with the small-pox, unless there has been an express contract with him for such service by the proper officers in behalf of the town.[4]

[1] Johnson *v.* St. Clara Co. 28 Cal. 545.
[2] Mays *v.* Hogan, 4 Texas, 26.
[3] Graham *v.* Gautier, 21 Texas, 120.
[4] Childs *v.* Inhabitants of Phillips, 45 Maine, 408.

CHAPTER IV.

PERSONAL LIABILITIES.—MALPRACTICE, CIVIL AND CRIMINAL.—CONTAGIOUS DISEASES.

§ 52. In the preceding chapters we have examined the legal status of physicians, so far as their general and professional responsibility to the public extends. We have shown what is of right expected of them *ex officio*, and under what circumstances. And having done this, we shall be the better able to inquire by what forms of deviation from their acknowledged obligations and responsibilities towards patients, (negligence,) or by what departures from accepted canons of orthodox practice (want of skill) they render themselves liable to actions for malpractice. In passing from established decisions forming the foundations of positive law, to hypothetical cases, requiring for their solution a resort to analogical reasoning, we shall, at times, necessarily, be treading upon new and untried ground. This is inevitable. Yet it need not mislead inquiry in any direction, since the principles of individual responsibility are so trenchantly established in questions relating to the rendition of personal services, that we can always appeal to them for a safe and speedy answer to all interrogatories.

§ 53. The obligations involved in the discharge of professional duties are not always nor necessarily subjects of legal accountability. Yet in many senses they are so inwoven into the texture of professional conduct as to exceed the limits belonging to the domain of pure ethics,

and to enter that of civil responsibility. The physician has no exclusive privileges of absolution for wrong-doing derived from his profession, and becomes responsible, therefore, for any damages to the health, or for any disfigurement of the person of a patient, which are directly traceable to his want of skill or diligence. Blackstone, in his usual sententious style, has well elucidated this doctrine in the following words: "For it hath been solemnly resolved that *malapraxis* is a great misdemeanor and offence at common law, whether it be for curiosity and experiment, or by neglect, because it breaks the trust which the party had placed in his physician, and tends to the patient's destruction."[1] These principles are unquestionably just, and will be found, when strictly applied, to work harm to no man. They simply exact truth, in requiring the possession of skill to accompany its promise, and honesty or fidelity in demanding that its application shall be uniform and consistent throughout the period of attendance upon the patient. Less than this could not be required, since rules and a method must govern all our civil relations, in order to insure mutual protection to the personal rights of each member of society, and surely no man can justly complain when judged by a standard of his own enactment.

§ 54. But inasmuch as the argument of success is the most potential in its influence over the popular mind, and answers for a test and proof of a man's merit, while he who fails, is apt thereby to be deemed incompetent and blameworthy, it often follows, in the practice of medicine, that a failure in the expected results of a particular treatment too often invites unjust opprobrium upon the practitioner; and not always content with blot-

[1] Black's Com. vol. 3, p. 121.

ting his fair fame, the evil-minded frequently lend themselves to the ungracious task of extorting damages by encouraging a suit for malpractice against him. In the majority of cases these actions are the direct offspring of "envy, hatred, malice, and all uncharitableness," and when rocked in the cradle of calumny, and nursed by the hand of speculation, injury is often inflicted upon the character of a physician, who is at the same time left without any proper remedy at law. The effect, also, of such suits upon the public mind is apt to be pernicious, for success in obtaining damages often stimulates others into a repetition of the experiment, and the physician consequently practices his art in chains, being perpetually exposed to the risk of a suit which may ruin his reputation as well as his fortune. It becomes lawyers, therefore, to consider, when called upon to institute such suits, that little value can be placed upon the ipse-dixit of a layman sitting as a critic upon the professional conduct of a physician. And that, aside from such personal delinquencies as drunkenness, or gross negligence, cruelty towards, or abandonment of, his patient, the field in which the physician discharges his professional duties is practically a *terra incognita* to the unlearned, and one where no lay critic can follow him. How, for example, can any person, even the most learned, determine the precise limit of influence of an exciting cause upon a lurking predisposition, define the point at which a pathological action commences in an organ like the brain, or measure and prognosticate the effects of shock upon different constitutions? Who can always decide when an effect flows solely from the interference of human art, or whether recuperative powers were not lost in consequence of shocks in no other wise revealed than circuitously, thus entail-

ing, by heaven's own foreordained laws, permanent deformity or disability?

The following observations of a French judge are worthy of the deepest consideration in their exposition of the duties incumbent upon courts in suits for malpractice. We have accordingly ventured to translate them, although well aware that they lose much of their force and perspicuity by being presented in a different language: "Admitting even that the legislator could not, without danger, have disarmed society upon this point (professional responsibility) it must be acknowledged also that courts should employ the powers confided to them with prudence and moderation. They are not competent judges either of theories, opinions, or systems. They can not appreciate the character of an opportunity for, and the more or less perfect execution of, a surgical operation; nor the value of a special form of treatment, because they can never be converted into medical tribunals of ultimate appeal, apportioning the blame to the penalty, and pointing out the path which should be pursued. That, in consequence, their intervention, in this region reserved to science, can not be exercised at all. And that it only begins beyond it, where, in the light of common sense, and independently of all theories provoking discussion, there has been exhibited on the part of the physician grave errors, negligence, manifest want of intelligence, unskillfulness, or ignorance of such things as all practitioners of a profession should know; and that he has, through these means, compromised the life of the patient, or converted an operation performed upon him into a true wounding."[1]

§ 55. While no professional man can expect to sail

[1] Aff. Viney & Schrieber, Jour. du Palais, vol. 45, p. 318.

always on a summer sea of success, where adverse winds shall never buffet him, he has the right to insist that what is not positively his fault or his wrong, the result of his ignorance, unskillfulness, negligence, or harshness, shall not be charged to the discredit of his reputation, or the damage of his estate. Nature has the exclusive mastery over her own laws and their operations, and although she permits man at times to modify the latter to some slight extent, she never allows him to usurp dominion there. Hence deformities after fractures, or following surgical operations, or special diseases, are not, necessarily, the consequence of human interference, but oftener the legitimate effects of nature's imperfect reparation, for there is a point beyond which this faculty ceases to maintain its integrity, and a species of secondary or provisional repair is all that she can manifest of recuperative power. In such cases the defect is constitutional and natural, and not the immediate consequence of human agency.

§ 56. Nevertheless, there are cases in which medical practitioners, or men styling themselves such, have unquestionably merited censure for their short-comings in proficiency, diligence, or considerate behavior. Cases, too, so far transcending the merely ethical canons of the profession as to bring their transgressors within the pale of legal accountability. And yet it is to be remarked as a singular illustration of criminal impunity, that while the army of quacks is enormously large, and the amount of malpractice committed by them correspondingly extensive, they have, as a class, suffered less, in pocket, for their sins than regular practitioners have for inevitable accidents occurring in their practice. The reason of this will be found in the fact that quacks are rarely, if ever, sued for damages. When brought before courts, it is generally

under a criminal prosecution, and as the gist of criminal responsibility is the intention or malice, expressed or implied in an act of wrong-doing, it becomes at times extremely difficult to prove the *malus animus* as laid in the indictment. Whence it follows that the defendant usually escapes, however flagrant his offence. This was well illustrated in the case of those two eminent malfeasants, Samuel Thompson,[1] tried in Massachusetts in 1809, and St. John Long,[2] tried in England in 1830. The victims of both of these quacks died miserably under their hands, and under circumstances of peculiar and most inexcusable barbarism. There was more than ignorance manifested in their malpractice. The treatment pursued in either case was harsh, rash, and intemperate, to speak in the mildest terms. It was a wanton tampering with human life, carried on in the face of most unmistakable proofs that it would terminate fatally, if persisted in. Yet in both instances there was an acquittal of the offence, as charged in the indictment, under the technical maxim that, *actus non facit reum, nisi mens sit rea.* Although they were undoubtedly associated with an act of homicide, it was still held to be of that kind termed by *misadventure*, which implies no guilty intention on the part of its perpetrator, nor is the result of any act unlawful in itself. In the absence of testimony to the contrary, the court felt itself bound to consider that, in the treatment of their patients, however unfortunate it may have proved, they were actuated by a sincere desire to benefit them, and when death ensued without evidence of criminal complicity on their part, it could not go behind this fact to inculpate them.[3]

[1] Commonwealth *v.* Thompson, 6 Mass. 134.

[2] Rex *v.* Long, 6 Bingham, 440, and 6. C. & P. 423.

[3] Empiricism is not, however, the heritage of modern times alone, for

Although these decisions have risen into the authoritative character of leading cases, and can not be questioned upon the technical basis on which they rest, we are indisposed to consider them as in any degree settling the point upon which the gist of the issue should turn in such forms of malpractice. The question is not one involving personal malice towards the patient, any more than an act of carelessness on the part of a railroad engineer can be construed into evidence of a *malus animus* towards any particular passenger killed; for, although the running of a railroad train, or the administration of medicines, are both lawful acts *in themselves*, yet whenever they tamper with human life, through negligence or carelessness, they become at once *trespassers*, and as such impart a criminal character to their perpetrators. The true problem to be decided, then, is, whether a man professing to be a physician, and taking that title *cum onere*, should not be presumed, like every other intelligent human being, to intend the natural, necessary and inevitable consequences of his own acts. And by as much as he claims special knowledge of the operations of drugs, or surgical manipulations upon the human body, should better apprehend the probable consequences of their administration, or the effects of surgical operations, so as to retard rather than hasten fatal results. Is it, or not, *gross ignorance, or want of ordi-*

Pliny, the historian, when speaking of the science of medicine in Rome, alludes in unmistakable terms to the ignorance and irresponsibility before the law, of physicians in those ante-Justinian days.

"And then, besides, there is no law in existence whereby to punish the ignorance of physicians, no instance before us of capital punishment inflicted. It is at the expense of our perils that they learn, and they experimentalize by putting us to death, a physician being the only person that can kill another with sovereign impunity. Nay, even more than this, all the blame is thrown upon the sick man only; he is accused of disobedience forthwith, and it is the person who is dead and gone that is put upon his trial." Hist. Naturalis, lib. xxii. cap. 8, in Bohn's Classical Library.

nary skill in a physician to continue a particular course of treatment in the face of evidence that the powers of life are being directly lowered by it; that each fresh dose, or operation performed, permanently reduces the strength of the patient by consecutive abstractions of functional energy, so that he is being hurried to his grave in a professional hearse, the driver of which is urging his steeds to their best time? Yet this was practically the case with both Thompson and Long, who persisted in a form of treatment which, at every stage of its progress, condemned itself. And the court in both instances allowed itself to be beguiled by witnesses testifying that *some* persons who had been treated by these two quacks had recovered, although the evidence did not show that they had been treated precisely in the same way, or even if it had, that the parties were all identically circumstanced in *age, sex, constitutional vigor, habits, idiosyncrasy, and diseased manifestations.* In other words, these courts allowed themselves to mistake *similarity* for *identity.* No greater error than this could be committed in the domain of physical exploration, and when it enters the sphere of legal responsibility, it becomes simply impossible to prove an act, dependent upon vitality for its manifestations, to have had any necessary connection with a particular agency, so that, since nothing can be proved absolutely, nothing can be proved relatively. Arguing from similarity instead of identity, we open the door to innumerable and insoluble contradictions.

§ 57. It may be affirmed as a doctrine underlying the acceptance and rendition of any personal service, that the mandatary always engages to employ his best ability and diligence in discharging the trust confided to him. Hence, whatever may be the degree of skill possessed by a

physician, the law always infers an implied engagement on his part to use his best judgment and diligence to secure a favorable termination to the case. And it holds him responsible for all wrongs accruing to the patient, from omission as well as commission. Negligence, or carelessness and want of diligence; harsh and unscientific treatment; unwarrantable experiments, and the like, all render him obnoxious to censure, and liable for the results of such professional shortcomings.[1] But it is generally very difficult to prove negligence of the lighter kind, (levis negligentia,) for the question may turn altogether upon points in professional treatment, which none but the attending physician himself, or another equally competent, and having seen the patient during his illness, could rightly interpret. It is not the number nor the frequency of visits alone that constitute diligence in a physician, nor, contrariwise, is a less number than friends or relatives expect him to make, to be imputed to him as an evidence of negligence. One physician may call often, yet needlessly, so far as any practical benefit can accrue to the patient; another may call fewer times, and yet leave an impress of good following every visit. Of the varying necessities of each case, laymen can properly exercise no

[1] The law implies an undertaking, on the part of every medical practitioner, that he will use an ordinary degree of care and skill in his practice, and will hold him liable for gross carelessness or unskillfulness. Bowman *v.* Woods, 1 Iowa, 441; Reynolds *v* Graves, 3 Wis. 416.

Toutes les pertes et tous les dommages qui peuvent arriver par le fait de quelque personne, soit imprudence, légèrete, ignorance de ce qu'on doit savoir, ou autres fautes semblables si légères qu'elles puissent être, doivent être réparcés par celui dont l'imprudence ou autre faute y a donnée lieu: car c'est un tort qu'il a fait quand meme il n'aurait pas eu intention de nuire." Domat, liv. 3, sect. 4, No. 1. Les medecins sont responsables de leurs actes, s'il y a faute lourde, négligence coupable, inattention au maladresse de leur part, dans l'exercise de leur profession. Aff. Perrot. Jour. du Palais. vol. 58, p. 221; Dr. Groenvelt's case, 1 Lord Raymond, 213.

judgment, and therefore emit no opinions which are entitled to any weight. Problems of slight negligence, or want of diligence, since the two are closely correlated, can alone be solved by experts. And in a leading case upon this doctrine, Lord Ellenborough told the jury "that the gist of the action was negligence, of which direct evidence might be given, or it might be inferred by the jury, if the defendant had proceeded without any regard to the *common and ordinary rules of his profession*, that unskillfulness alone, without negligence, would not maintain the action; and that he was at a loss to state to the jury what degree of skill ought to be required of a village surgeon."[1]

PRESCRIBING REMEDIES.

Prescribing remedies for the cure of disease is an art which tests to the highest degree the scientific attainments of the physician. Unlike any other art, its practice may be as skillfully displayed in a negative way, and by a passive waiting upon nature's own operations, as by an active and positive participation in them, through medicinal instrumentalities. The ordinary skill required to be possessed by the physician must, in any given case, be exercised in one or the other of these directions, and according as it is guided by caution, diligence and experience, or applied carelessly, negligently, and imprudently, will it benefit or injure the patient. While it is unquestionably true that an error of judgment can never be considered a misdemeanor in itself, being inseparable from the operations of all finite minds, there is nevertheless, a

[1] Seare *v.* Prentice, 8 East's R. 347.

class of mistakes at times committed, which are wholly *inexcusable*, because of the fact that they exhibit a total ignorance of the first and fundamental principles of a science. They are not errors of judgment so much as errors of original apprehension, for, in most instances it could be shown that had the judgment acted at all, they would never have occurred, *provided* the party was skilled in the subject matter to which they relate; for, as ordinary skill includes, and therefore implies, capacity of apprehension in that direction in which it is assumed to exist, it follows that absence of such capacity becomes *prima facie* evidence of want of this degree of skill. Thus a writer's style may be tumid, or jejune, prolix or elliptical, and still reveal an acquaintance with the syntax of the language he employs. But a man who can not spell correctly, confesses at the outset an entire ignorance of the first and most essential requisites of all verbal composition. By parity of reason, in medicine, one physician may be more or less skillful than another, but every physician is bound to possess, and to exhibit knowledge of the *elements* of his art in its practice, as the moving consideration to his employment, and the hinge on which his contract for services turns; and if he fails to do so, he is guilty of fraud towards those employing him.

Thus, passing beyond the commonplace topic of the number or frequency of visits, there might arise questions as to whether certain stages in treatment had been consecutively followed according to the most orthodox canons of practice. Whether a physician had exhibited gross ignorance of the established laws of doses[1] as convention-

[1] The doses administered by the Fathers of Medicine were, as a general rule, much larger than those prescribed in modern times. But neither this fact, nor the tolerance of larger doses by particular individuals, as in the

ally, and therefore professionally, recognized, or, again, whether, if not absolutely over-doses, they were properly graduated to meet constitutional necessities, since there is a wide difference between the two, an absolute over-dose under any circumstances arguing ignorance, and therefore want of ordinary skill, a relative over-dose expressing either negligence, as where a physician prescribes for a patient without seeing him, or a simple error of judgment, excusable as an accident, whose results, if fatal, have occurred *per infortuniam.*

Again, whenever certain remedies of a notoriously dangerous character have been administered, whether information as to the necessity of more caution in following

cases of *opium, alcohol, mercury, tartar emetic,* &c., would justify a physician in following such examples to the exclusion of the tables of doses adopted by the profession. And in a case of alleged malpractice through an *absolute* over-dose administered to a patient, no plea in extenuation or excuse should be received which is based upon *exceptional* or *occasional* cases. We subjoin some of the doses of the ancient physicians, by way of illustration:

Thus, HIPPOCRATES gave an obolus or 10½ grains of elaterium in a female case.

SCRIBONIUS LARGUS gave a catapotium for a cough, which in one dose contained from 6 to 8 grains of opium, and was often repeated three or four times a night.

MARCELLUS gave 31 grains of aloes for a *laxative.* And the famous *purgatoria ex* Hermodactylo Podagrica, or arthritic purgative, consisted of one-third colchicum, and the dose, *four scruples,* contained 27 grains of colchicum alone.

PAULUS AEGINETA gave the following doses, viz.: aloes, 62 grains; helleborus niger, 62 grains; scammony, 4 oboli, or 42 grains; colocynth, 62 grains; elaterium, 32 grains; oxide of copper, 31 grains.

CELSUS gave the electuarium Mithridatem Polupharmacum in doses containing 6 grains of opium.

It will thus be perceived that the doses of the ancients were *four* times as large as ours. Truly, *tempora mutantur et nos mutamur in illis. Vide Milligan* on Doses of Ancient Physicians; and *Arbuthnot,* Ancient Weights and Measures, 288.

directions for their administration,[1] as to their compatibility with particular articles of diet, occupation, exercise, or posture had been imparted; or whether such informamation, constituting a branch of preventive medicine, had been imprudently omitted, and the patient, in ignorance of such necessary particulars, had been allowed to follow his own inclinations in regard to them all. There can be no doubt that, as forming part more or less of every treatment, it is incumbent upon the physician not to overlook them. Doing so habitually would argue negligence. Yet, unless it could be shown that harm directly accrued to the patient from want of such knowledge in the care of his own person, as the physician was, under the circumstances bound to impart, no fault could be imputed to the latter from such omission. The absence of any injury would show, inferentially, that no special advice on this score was needed. But in the contract for the rendition of medical services, prevention becomes in fact a part of performance, and this point must not be overlooked in determining whether any, and if so, what, measure of negligence has been committed by him who has failed in this particular element of his duty towards another. The old doctrine that there must be gross carelessness or negligence, in order to render a physician liable, is becoming fast obsolete. It is sufficient that there be simple negligence, or want of ordinary skill and diligence.

§ 58. But whenever his misconduct passes into the domain of gross negligence, carelessness or harsh treat-

[1] As in cases, for example, where such drugs are prescribed as Battley's solution, preparations of opium, of morphia, hyoscyamus, conium, stramonium, aconite, belladonna, ether, chloroform, hydrocyanic acid, Indian hemp, strychnia, digitalis, &c., an omission to give directions for their cautious use, with due warning of their dangerous powers, would justify a presumption of gross negligence.

ment, and death or permanent injury results as its consequence, though without any intention on his part, the tort becomes the more apparent, and damages will lie against him.[1] In all cases, however, whether of slight or gross negligence, some injury must be proved to have been inflicted upon the plaintiff, and this injury must be directly traceable to the agency of the physician. Inferences drawn from length of convalescence, or from deformities happening after fractures, or extensive injuries to joints, are not in themselves of any value as evidence of malpractice. They only prove that the work of reparation has been slowly or imperfectly done, but they do not *per se* show by whom—nature or the physician. Both nature and art have their limits, and wherever their operations are coincident or concurrent, the gist of the inquiry will be the extent of influence exercised by either in a given case. Thus, permanent injury, or even death, might result from a surgical operation through *contiguity* to sensitive organs, without *solution of continuity* or invasion of them whatever. And if so from artificial causes, why may not the same happen from natural injuries? What proportion of fractures or dislocations would be recovered from with-

[1] Ainsi un medecin peut être déclaré responsable de la perte d'un membre fracturé sur lequel il a opéré, s'il est constaté que l'accident a eu pour cause la gangrene produite dans ce membre par une trop forte constriction exercée sans méthode et sans discernement, et accompagné d'un traitement contraire à toutes las regles de l'art et de la science. Dalloz, Jurisp. Generale, 1862, Prem. partie, p. 419.

The Roman law showed little tenderness in such such cases. Magna negligentia *culpa* est, magna culpa, *dolus*. Digest, 50, 16, § 65.

Praeterea si medicus qui servum tuum secuit, dereliquerit curationem, atque ob id mortuus fuerit servus, culpæ reus est. Inst. lib. 4, tit. 3, § 6.

Sicuti medico imputari eventus mortalitatis non debet, ita quod per imperitiam commisit, imputari ei debet; praetextu humanae fragilitatis delictum decipientis in periculo homines innoxium esse non debet. Ulpian, ad Dig. tit. 18, § 7.

out deformity if left to nature alone? The few, if any, who would be willing to trust themselves exclusively to her ministrations in an instance of this kind, shows what the general opinion of society is on the subject.

§ 59. The term malpractice, *mala praxis*, meaning *an improper discharge of professional duties, either through want of skill or negligence*, has been more particularly applied to such torts when committed by a physician, surgeon, or apothecary. Strictly speaking, the term is of much wider significance, and embraces within its purview, as in the definition above given, all avocations requiring for their practice special skill and education. Therefore, all professional torts committed either by a physician or surgeon in the course of his practice, and constituting, essential varieties of MALPRACTICE, may, for simplicity's sake, be included under two general heads, viz., malpractice by *commission*, or *the want of ordinary skill in the discharge of professional duties;* and malpractice by *omission*, or *negligence in the discharge of such duties.* These classifications cover and comprehend all cases that can occur, whether of *malfeasance, misfeasance*, or *nonfeasance.*

WANT OF ORDINARY SKILL.

§ 60. Inasmuch as the original basis of the physician's responsibility rests upon the maxim that in common with all professional men *spondet peritiam artis*, and that consequently any want of ordinary skill is to that extent a fraud upon his employer, the question of *intention* does not at all enter into the problem of responsibility, nor will it afford any foundation for a plea in extenuation of malpractice. The want of ordinary skill is a wrong in itself

against the public, whose criticism is disarmed, and whose confidence is seduced by the general announcement of a person as a practitioner of medicine.[1] The world has not time to inquire into the individual proficiency of every professional man; hence it presumes him to be furnished with that amount of skill which he is under obligation, by virtue of his calling, to possess. That amount need not in itself be great; it may, and does, vary widely among men, but it must at least be sufficient to entitle him to a lawful and recognized place among his own fraternity. If, therefore, by illegally assuming a title, and holding himself out as a practitioner of any science, when he does not possess the required qualifications, a man induces the public to employ him, he is nevertheless a pretender and a wrong-doer *ab initio*, and as such, every professional act performed by him is tainted with fraud. This doctrine, though apparently casuistical, because it cannot now be vigorously enforced before courts, was the original basis of the system of *licensing*—a system eminently conducive to the purity and proficiency of the medical profession, since, when a man was not permitted to practice without a license, some inkling might be had of his character, and how he came into a profession. Like a baptismal register,

[1] The Roman civil law, ante-dating these fundamental principles of Christian jurisprudence, regarded the want of skill in a physician as a *wrong*.

"Imperitia quoque *culpæ* adnumeratur, veluti si medicus ideo servum tuum occiderit, quod cum male secuerit, aut perperam ei medicamentum dederit." Institutes, lib. IV. tit. 3, § 7.

The same principle by analogy of reason obtained in the case of *pilots*, under the laws of Oleron, cap. 23, 24. "If a pilot undertakes the conduct of a vessel, to bring her to St. Malo, or any other port, and fail of his duty therein, so as the vessel miscarry by reason of his *ignorance* in what he undertook, and the merchants sustain damages thereby, he shall be obliged to make full satisfaction for the same, if he hath wherewithal, and if not *lose his head*." Ward's Law of Nations, vol. 2, p. 107.

it certified at least to the fact that he had a legal birth and a parentage, and was not auctothonic. "When a person," says Judge Shepley, "offers his services to the public in any business, trade, or profession, there is an implied engagement with those who employ him that he will perform the business entrusted to him faithfully, diligently and skillfully. And if he fails to do so, he is answerable for the damages suffered by reason of such neglect."[1]

§ 61. A physician, therefore, who does not exercise ordinary professional skill is liable for malpractice. Nor can he recover compensation for any visits in treating a broken limb, or any disease requiring definite attendance, if he be guilty of malpractice in any part of the treatment, as the contract is an entire one.[2] For, where a party undertakes a work of skill and labor, and fails in the object, so that his employer derives no benefit from the work, the plaintiff is not entitled to recover anything.[3] But the malpractice will not be inferred, unless well proved, as the legal presumption is against it.[4] It matters little whether any compensation, either present or prospective, enters into the contract as a moving consideration, since, if a man even gratuitously undertakes to do a thing to the best of his skill, where his situation or profession is such as to imply skill, an omission of that skill is imputable to him as gross negligence.[5] Professional

[1] Odlin *v.* Stetson, 17 Maine, 247; Wilmot *v.* Howard, 39 Verm. 447.

[2] Bellinger *v.* Craigue, 31 Barb. 534; Long *v.* Morrison, 14 Ind. 595; Ritchey *v.* West, 23 Ill. 385.

[3] Bellinger *v.* Craigue, 31 Barb. 534, 4. *Ibid.*

[4] Duncan *v.* Blundell, 3 Starkie, 6. So it may be gathered from the cases, and from obvious reasons that where the work to be done requires peculiar skill and care, and the mandatary undertakes it in such way as to be bound to go through with it, the want of the required skill and care would be negligence enough. Parsons on Cont. vol. 2, p. 106.

[5] Per Ld. Loughborough in Shiels *v.* Blackburn, 1 H. Blacks. 158.

responsibility rests exclusively upon the character publicly assumed by him who undertakes to render such services. A man publicly announcing himself to be a physician or lawyer takes the title *cum onere*, and the advantages which such callings confer, are always accompanied by corresponding responsibilities. It is otherwise with those not professing to practice any particular art, whose services they are requested to render.[1] Hence, if a patient applies to one not a physician, for his gratuitous assistance, who either does not exert all his skill, or administers improper remedies to the best of his ability, such person is not liable.[2] So, a surgeon does not become an actual insurer of the good effects of his treatment, and he is only bound to display sufficient skill and knowledge of his profession to properly discharge its duties. If from some accident, or some constitutional defect in the patient an injury happens, he will not be held responsible.[3]

[1] Ibid.

[2] In all cases where a damage accrues to another by the negligence, ignorance or misbehavior of a person in the duty of his trade or calling, an action on the case will lie. But it is otherwise, where the law lays no duty upon him. Buller N. P. 73.

"We read a pleasant story of a man who had sore eyes and came to a horse-doctor for relief; the doctor anointed his eyes with the same ointment he used among his horses, upon which the man falls blind, and the cause is brought before the judge, who acquits the physician. *For, if the fellow, says he, had not been an ass, he had never applied himself to a horse-doctor.*" Puffendorf, L. of Nat. & Nations, lib. 5, cap. 4, § 3, fm. Saadi.

And it would seem that, anciently, surgeons being exclusively restricted to a *manual* art, were not expected to administer remedies, and therefore, not responsible, *quoad hoc.*

Les chirurgiens ne sont pas garans et responsables *de leurs remèdes*, tant qu'il n'y a que de l'ignorance ou de l'impéritie de leur part, *quia aegrotus debet sibi imputare cur talem elegerit.* Decree of Parliament of Paris 1696, in Merlin Rep. de Jurisp. ad tit. *Chirurgien.*

[3] Hancke *v.* Hooper, 7 Carr. & P. 81.

§ 62. It is of course extremely difficult to determine, with any degree of exactness, what constitutes such a want of ordinary skill as will enable us to establish a general principle applicable to all cases in which a deficiency of it is alleged. Necessarily, every case has its own complexion, and is, in its requirements upon the practitioner for special forms of treatment, more or less simple or complex. In proportion to the delicacy of an operation, or the difficulty of treating a particular disease rises the measure of required skill. As every disease is modified to some degree by the constitutional peculiarities of the body in which it manifests itself, it becomes difficult, if not impossible to lay down in advance, any standard of pre-requisite skill, assumed as indispensable to its successful treatment. A physician is not to be blamed for encountering a disease which is beyond the reach of his art, since the same thing might happen to any one however skillful, and does in fact occasionally happen to every one in the course of daily practice. Fatal cases are not necessarily reflections upon the skill of the physician having them in charge, but belong to the sphere of natural and unavoidable consequences.

"Want of skill," says a writer on this subject, "does not mean the want of the greatest possible medical talent or attainments; still less does it signify the having erred in opinion as to the disease, or the mode of treatment adopted; but the want of that general and ordinary knowledge of the profession which the law expects from every man who ventures to proclaim himself a member of it; or a total want of professional skill, and knowledge in the particular operation or complaint which he has undertaken to cure."[1]

[1] Willcocks on Med. Prof. p. 105.

§ 63. What is demanded therefore, in every practitioner, is simply that average amount of skill necessary for the ordinary duties of his profession, since this is the minimum that will suffice for its successful practice. In a recent English case it was held that, "To render a medical man liable, even civilly, for negligence, or want of due care or skill, it is not enough that there has been a less degree of skill than some other medical man might have shown, or a less degree of care than even he himself might have bestowed; nor is it enough that he himself acknowledges some degree of want of care; there must have been a want of competent and ordinary care and skill, and to such a degree as to have led to a bad result.[1]

§ 64. Where the declaration against a surgeon alleged that the plaintiff sustained injury from the want of skill and mere neglect of the surgeon in the treatment of a fracture, it was held that evidence that the defendant had received a good surgical and medical education, and was a regularly educated and skillful surgeon and physician was admissible, because it tended to disprove a material allegation of the declaration.[2] This presumption of quali-

[1] Rich *v.* Pierpoint, 3 F. & F. 35.

In an action against a physician for malpractice, testimony is not admissible on the part of defendant for the purpose of showing his general skill, though, when evidence had been introduced, showing that other medical men had been called in for a consultation without invitation or notice to the defendant, a medical witness for the plaintiff may be asked by the defendant as to the practice of physicians in regard to consultations. Mertz *v.* Detweiler, 8 W. & S. 376.

But it is not admissible for the defendant to ask another physician, "If the patient thus behaves (refuses to obey the physician's prescription as to remaining quiet) is the physician responsible for the termination of the case?" this not being a matter of professional skill. Ibid.

[2] Leighton *v.* Sargent, 7 Foster (N. H.) R. 460.

fication derived from the possession of a regular medical education, is based upon the recognition of canons of practice justified by long experience, and adopted universally by the profession as a rule of approved conduct; hence, where the settled practice and law of the profession allows of but one course of treatment in a given case, any departure from such course might properly be regarded as the result of want of knowledge, skill, experience, or attention.[1] For, a physician is liable for damages arising as well from the want of skill, as from neglect in the application of skill.[2]

Dentists, as well as physicians, are required to use a reasonable degree of care and skill in the manufacture and fitting of artificial teeth. But the exercise of the highest perfection of the art is not implied in their professional contract.[3]

§ 65. In the case of Slater *v.* Baker, which was a special action on the case against a surgeon and an apothecary for unskillfully disuniting the callous formed on a fractured leg, after it was set, Wilmot, C. J., pronouncing judgment, said—"It is objected that this is not the proper action, and that it ought to have been trespass *vi et armis;* in answer to this it appears from the evidence of the surgeons that it was improper to disunite the callous without consent; this is the usage and law of surgeons; then it was ignorance and unskillfulness in that very particular, to do contrary to the rule of the profession what no surgeon ought to have done; and indeed it is reasonable that a patient should be told what is about to be done to him, that he may take courage, and put himself

[1] Patten *v.* Wiggin, 51 Maine, 594.

[2] Long *v.* Morrison, 14 Ind. 596; Conner *v.* Winton, 8 Ind. 315.

[3] Simonds *v.* Henry, 39 Maine, 155.

in such a situation as to enable him to undergo the operation. That the plaintiff ought to receive a satisfaction for the injury, seems to be admitted, but then it is said the defendants ought to have been charged as trespassers *vi et armis*. The Court will not look with eagle's eyes to see whether the evidence applies exactly or not to the case; when they can see the plaintiff has obtained a verdict for such damages as he deserves, they will establish such verdict if possible. For anything that appears to the Court, this was the first experiment made with this new instrument, and if it was, it was a rash action, and he who acts rashly, acts ignorantly; and although the defendants in general may be as skillful in their respective professions as any two gentlemen in England, yet the Court cannot help saying that, in this particular case they have ignorantly and unskillfully acted, contrary to the known rule and usage of surgeons."[1]

§ 66. Where, by improper treatment of an injury by a surgeon, the patient must inevitably have a defective limb, the surgeon is liable to an action even though the mismanagement or negligence of those having the care of the patient, may have aggravated the case, and rendered the ultimate condition of the arm worse than it otherwise would have been.[2] In such case the surgeon must be regarded as a *trespasser ab initio*, and having inaugurated a line of wrongful tendencies, of an irrepressible character, whatever addition may be made to their sequences by the mismanagement of third parties, cannot exonerate him from blame for his original misconduct. A man who, by a wrongful act, sets in operation a series of pernicious influences, is responsible for all the results of such in-

[1] 2 Wilson, 359.

[2] Wilmot *v.* Howard, 39 Verm. 447.

fluences; nor can he shield himself behind the alleged aggravation by others of causes sufficiently competent in themselves to insure permanent injuries. Even where habits of body, notoriously undermining the constitution and impairing the powers of nutrition and reparation, are alleged in defence, care must be taken to show some immediate connection in time between the existing habits and the injury, for this time cannot be stretched backwards indefinitely.[1]

§ 67. The liability of a surgeon for an error of judgment depends not merely upon the fact of his ordinary skill, but upon the question whether in the treatment of the case he has used such reasonable skill and diligence as is ordinarily exercised in his profession.[2] And a surgeon is also responsible for any injury done to a patient, through the want of proper skill in his apprentice; but, in an action against him the plaintiff must show that the injury was produced by such want of skill, and it is not to be inferred. And if a person goes into a surgeon's shop, and asks to be bled, saying he has found relief from it before, and does not consult the person there as to the propriety of performing the operation, if there are no external indications of its being improper, such person is

[1] Where it had been shown by the evidence of scientific men, that a fractured limb of an intemperate man was more difficult to cure than that of a temperate man, but where no such evidence was offered of the degree of intemperance then existing, or how long it lasted, to show the difficulty of such cure; it was proper for the court below to refuse to allow the patient's habits and character, in this respect, to be put in issue for an indefinite period, backward. It was enough to lay it open for seven years previous to the injury, if not too much. McCandless *v.* McWha, 1 Casey, 95.

[2] West *v.* Martin, 31 Miss. 375; Duncan *v.* Blundell, 3 Starkie, 6; Farnsworth *v.* Garrard, 1 Campb. 38; Kannen *v.* McMullen, Peake, 83; Templar *v.* McLachlan, 2 New R. 136; Fisher *v.* Samuda, 1 Campb. 190; Denew *v.* Daverell, 3 Campb. 451; Moneypenny *v.* Hartland, 2 C. & P. 378.

justified in performing it, and the surgeon will not be answerable for its not producing a beneficial result.[1]

NEGLIGENCE.

§ 68. Next to the obligation incumbent upon the physician, of possessing the ordinary skill of his profession, comes the duty of employing it sedulously for the benefit of the patient. We have seen that he is not obliged to take any case which may offer itself, and thus to practice indiscriminately, but having once assumed the care of a patient, he is legally bound to use his best skill and attention in performing a cure.[2] Hence, negligence is as much a fraud upon his employer as want of skill, for it is upon the diligent application of his skill that must rest the problem of success, and there is implied in his contract *assiduity* as well as *proficiency*. The law punishes negligence no less than want of skill, because it is, in fact, an omission to continue the means most essential to produce the end contemplated by the contract. And as this breaks the confidence upon which the contract reposes, it becomes to that extent a fraud upon the patient. It is undoubtedly true that the physician is the best judge of

[1] Hancke *v.* Hooper, 7 Carr & P. 81.

[2] The principle is plain and of uniform application, that when a person assumes the profession of physician and surgeon, he must, in its exercise, be held to employ a reasonable amount of care and skill. For anything short of that degree of skill in his practice, the law will hold him responsible for any injury which may result from its absence. While he is not required to possess the highest order of qualification to which some men attain, still, he must possess and exercise that degree of skill which is ordinarily possessed by members of the profession. And whether the injury results from a want of skill, or the want of its application, he will, in either case, be equally liable. This the law implies, whenever a retainer is shown; but when the services are rendered as a gratuity, gross negligence will alone create liability. Ritchey *v.* West, 23 Ill. 385.

the degree of attention which any case requires, nor is it in the omission to make a given number of visits that negligence resides. But whenever any important step in the treatment of disease is neglected, or any important stage of it overlooked which might have been used for the benefit of the patient, then it may be averred that the physician has been guilty of negligence, however assiduous he may otherwise have been at different periods of his treatment.[1] Skill and diligence may be considered therefore, as indissolubly associated, since skill judges of the measure of diligence required and also furnishes the latter with the eyes of observation and the hands of execution; while diligence on her part gives cumulative power to skill, and leaves no link wanting in the continuous chain of treatment.

§ 69. The civil law was emphatic in its condemnation of negligence which it stigmatized as a crime. "Praeterea si medicus qui servum tuum secuit, *dereliquerit* curationem, atque ob id mortuus fuerit servus, culpa reus est."[2] And Montesquien unfolds in unmistakable language the spirit of Roman legislation upon that subject, "Les Lois Romaines voulaient que les medecins pussent être punis pour leur negligence, ou pour leur imperitie. Dans ce cas elles condamnaient à la déportation un medecin d'une condition peu relevée, et à la mort celui qui était d'une condition plus basse."[3]

[1] Jugé que le medecin qui ayant fait une blessure à un malade, lors d'une saignée, refuse de lui continuer ses soins et abandonne ainsi volontairement le malade, peut être déclaré responsable et passible de dommages interets envers ce dernier, a raison de l'amputation du bras qu'il a du subir par suite de la blessure. Thouret,—Noroy C. Guigne, Cour de Cassation 18 Juin, 1835, Journal du Palais, vol. 27, p. 337.

[2] Instit. Lib. IV. tit. III. § 6.

[3] Esprit des Lois, Liv. XXIX. c. 14.

§ 70. We may start with the generally acknowledged principle, recognized in foreign as well as American courts, that a physician or surgeon, in the performance of his professional duties, is liable for injuries resulting from the want of ordinary diligence, care, and skill.[1] And though a defendant has been guilty of culpable fault or negligence, producing an injury, yet if his act was not wanton and intentional, and the plaintiff by his own misconduct, or want of ordinary care, essentially contributed to produce the result, he can not recover.[2] But the doctrine that a party can not recover, where his own negligence concurred in producing the injury for which he seeks redress, does not bind him to the utmost possible caution, but to ordinary care and prudence only.[3] And in an action for malpractice the proofs are limited to the allegations set forth in the declaration, and a plaintiff can not, therefore, give evidence that the physician abandoned the patient, unless it is so laid in the declaration.[4] Even if the patient die

[1] Landon *v.* Humphrey, 9 Conn. 209.

[2] Berge *v.* Gardiner, 19 Conn. 507, and ca. ci.

[3] Eakin *v.* Brown, 1 E. D. Smith, 36; Spooner *v.* Brooklyn R. R. Co. 31 Barb. 419; Mentges *v.* N. Y. R. R. Co. 1 Hilton, 425; Morris *v.* Phelps, 2 Hilton, 38; Cox *v.* Westchester Turnpike, 33 Barb. 414; Ashmore *v.* Pennsylvania, &c., Co. 4 Dutcher, 180.

[4] Bemus *v.* Howard, 3 Watts, 355. An action on the case lies against a surgeon for gross ignorance and want of skill in his profession, as well as for negligence and carelessness, to the detriment of a patient; though if the evidence be of negligence only, which was properly left to the jury, and negatived by them, the court will not grant a new trial, because the jury were directed that want of skill alone would not sustain the action. Seare *v.* Prentice, 8 East, 348.

Le médecin qui, en operant sur un membre fracturé une constriction trop forte par un appareil posé contrairement aux regles de l'art, et en négligeant de tenir compte des symptomes de gangrene produits, par cette constriction, a causé la perte du membre opéré, peut être déclaré responsable de cet accident et passible de dommages-interets envers le malade. *Aff. Boulanger, Jour. du Pal.* vol. 74, p. 197, A. D. 1863.

from improper treatment, an action for damages will lie against the surgeon.[1]

§ 71. In an action on the case brought by A. and B. his wife, against C., as a physician and surgeon, for malpractice in attempting to deliver B. of a child, it was averred that the defendant ignorantly, unskillfully, and negligently omitted to deliver B. for two days, contrary to the well known rules of practice in such cases; and that the defendant did so ignorantly, unskillfully, and wickedly behave himself in attempting to deliver B. that she suffered great and unnecessary pain, and received lasting and irreparable injuries and wounds, *held*, that particular acts of misconduct of the defendant might be given in evidence to sustain the general allegations in the declaration, and that it was competent for the plaintiffs to show by what means such injuries and wounds were received.

Held, also, that evidence of the declarations of the defendant that B. was infected with the venereal disease, and that this was the cause of the difficulty of her case, it being proved that she had not this disease, was admissible, for the purpose only of evincing the ignorance of C. as to the real state of her case.

Held, also, that it was competent for the plaintiffs to show that the defendant had not been regularly bred to his profession, for the purpose of rebutting evidence introduced by him, in support of his general professional character.[2]

§ 72. In Gladwell *v.* Steggall[3] a declaration in case

[1] Cross *v.* Guthery, 2 Root, 90.

In his omnibus casibus in quibus medicus aut chirurgicus peccat culpâ latâ, puniendus est non ex aliquo senatus-consulto, sed poenâ aliqua mitiori et pecuniaria aut certe extraordinaria ad arbitrium ipsius judicis. Damhouderius, *Praxis Rerum Criminalium.*

[2] Grannis *v.* Brandon, 5 Day. 260.

[3] 5 Bingham, N. C. 733.

stated that "plaintiff, an infant, had employed defendant, a surgeon, to cure her, and then claimed damages for a misfeasance. Plea, that plaintiff did not employ defendant. Held, that it was immaterial by whom defendant was employed, or that, if material, plaintiff's submitting to defendant's treatment was sufficient proof of the allegation of employment by her."

Even though no privity of contract subsisted between the surgeon and patient, as where he is employed at public charge to attend a dispensary or hospital, or gives his services at such places gratuitously, the patient may have his action against him *ex delicto*. This principle was well laid down in the case of Pippin *v.* Shepard,[1] where Garrow, B., said:

"In the practice of surgery particularly, the public are exposed to great risks from the number of ignorant persons professing a knowledge of the art without the least pretentions to the necessary qualifications, and they often inflict very serious injury on those who are so unfortunate as to fall into their hands. In cases of the most brutal inattention and neglect, patients would be precluded frequently from seeking damages by course of law, if it were necessary, to enable them to recover, that there should have been a previous retainer on their part of the person professing to be able to cure them. In all cases of surgeons retained by any of the public establishments, it would happen that the patient would be without redress, for it could hardly be expected that the governors of an infirmary should bring an action against the surgeon employed by them to attend the child of poor parents, who may have suffered from his negligence and inattention; and are they to be without remedy because they

[1] 11 Price, 400.

cannot get the names of the five hundred persons by whom the surgeon was employed, to insert in their declaration?"[1]

And in Hord *v.* Grimes[2] it was held, in support of this doctrine, that a physician is responsible for all the ill consequences which may result from the administration of medicine to a slave without the consent of the owner.

§ 73. A declaration by a husband and wife against a physician for malpractice, alleged that the defendant fraudulently represented to the female plaintiff that she was doing well, in consequence of which she did not apply to other physicians, and thereby lost the use of her hand; but there was no evidence that the plaintiffs desired to call in any other physician; held, that a witness could not be asked what effect was produced upon his mind by the declarations of the defendant concerning another physician in the same town. It was also decided that in such an action evidence is not competent for the plaintiff to show the effect of the remedies prescribed by the defendant for the wife, upon a person entirely well, nor to prove that the husband was unable to labor, and dependent upon his wife for his support, there being no allegation in the declaration of a loss of the wife's services.

In this action, several physicians testified that the disease of the thumb was a felon, which often resulted from a punctured wound. Held, that it was not competent to inquire of the plaintiff's nurse, who had attended her during all the time, when she first heard of a punctured wound in connection with the injury, it not appearing

[1] "Upon this ground, if an apothecary administer improper medicines, or a surgeon unskillfully treats his patient, the law holds them liable, although their contract was with a third person. Hilliard on Torts, vol. I, p. 252.

[2] 13 B. Monroe, 188.

that the defendant had ever assigned that cause as the origin of the disease.

Again, in this action there was evidence tending to show that the defendant did not communicate to the plaintiff the nature of the disease, but that he opened her thumb, giving as a reason that there was a nerve partly cut off, and it would be better to cut it entirely off. Held, that other physicians could not be asked "is it good medical practice to say you opened a thumb to cut off a nerve, because it is already partly cut off?"

In relation to the popular misnomer of parts justifying a like misuse of terms by physicians, in order to be understood by their patients, the court held, that in such an action, it was competent for the defendant to prove that physicians, in addressing their patients, often call the tendon of the thumb a nerve; and that it is good medical treatment in some cases for physicians to withhold from a patient the extent of their disease, and their actual condition; and that the treatment of the disease, as detailed by the principal witness for the plaintiffs, was proper in the opinion of medical men.[1]

§ 74. The science of diagnosis being among the most fallible, even in experienced hands, a physician or surgeon is not chargeable for ignorance of a case, if he prescribes for it rightly.[2] But if there is want of ordinary skill in the defendant in not detecting the kind of injury for several weeks, and the patient suffers pain and incurs expense in consequence thereof, even though he afterwards refuses to submit to a proper remedy, he may recover damages for this special injury.[3] Semble, also, in

[1] Twomley *v.* Leach, 11 Cush. 397.
[2] Fowler *v.* Sergeant, 1 Grant, 355.
[3] Ibid.

order that the jury may form some idea of the character and extent of the injury complained of, that the plaintiff may exhibit his limb to them.[1]

§ 75. In an action against surgeons for misconduct in setting a fractured bone, an allegation in the declaration that the defendants promised to perfect a cure, can only be sustained by positive proof of an express promise. The surgeon engages the ordinary skill of the profession, in reducing a fractured bone, and diligence and care in his subsequent treatment, and to use his exertion and endeavor to effect a cure; but a cure *itself* is frequently beyond his physical power, and the law will not imply such an undertaking.[2] And a surgeon is not liable for a want of the highest degree of skill in the performance of an operation in the line of his duty, but only for the want of ordinary skill, and for the want of ordinary care and judgment.[3]

§ 76. The measure of damages in suits for malpractice will of course vary with the circumstances of each case, not overlooking also the circumstances of the parties themselves.[4] And, in an action for damages against a physician for non-fulfillment of contract in the treatment of a disease which he had undertaken to treat, and for gross negligence in treating the same, the plaintiff may recover vindictive as well as actual damages.[5] In cases of alleged errors in treatment, predicated upon special forms of practice, differing in different schools, evidence is

[1] Fowler *v.* Sergeant, 1 Grant, 355.

[2] Grindle *v.* Rush, 7 Ohio, 2 p. 123.

[3] Howard *v.* Grover, 28 Maine, 97.

[4] "In cases against surgeons for malpractice, it is usual to inform the jury of the circumstances of the respective parties." Fowler *v.* Sergeant, 1 Grant, 355.

[5] Cochran *v.* Miller, 13 Iowa, 128.

admissible to prove that the treatment of the case was according to the system of practice of medicine which the physician professed, and was known to follow.[1] And in a suit of this kind, although no special consideration is alleged on behalf of the plaintiff, the promise to pay a reasonable reward will be implied from the employment; and the duty of the physician is to exercise a reasonable degree of care and skill, since this results from the character in which he assumes to act.[2]

CRIMINAL MALPRACTICE.

§ 77. Wherever death ensues as the alleged consequence of malpractice, it becomes necessary to inquire into the conduct of the physician so as to determine how far his want of skill or negligence have conspired to produce it. The question of *intention* must also be considered with relation to the remedies administered or the treatment pursued. Every rational being is presumed to intend the natural, necessary, and probable consequences of his own acts. Hence, if a physician administer a poison in poisonous doses, he must be presumed to intend the result which such substance is calculated inevitably to produce. Or, if he pursue a course of treatment which the experience of the profession has condemned as unsafe,

[1] Bowman *v.* Woods, 1 Iowa, 441.

[2] Peck *v.* Martin, 17 Ind. 115.

For further cases of malpractice, see Boston Medical and Surgical Reporter, vols. XL. p.318; LIV. p. 109, 129, 149, 229; LV. p. 515; LVI. p. 9, 25, 148; LVII. p. 222; LXII. p. 364; LXIV. p. 97, 505; LXV. p. 299; LXVI. p. 95, 524, 544; American Medical Monthly, vols. III. p. 155; IV. p. 495; New York Medical Times, vol. II. p. 365; Medical Examiner for 1847, p. 505.

and which has been rejected as no longer orthodox, he can not escape the presumption of wantonly trifling with life or health. Under such circumstances he places himself in the same position as one who premeditates upon the commission of a homicide, for he is presumed to know the effects of drugs, whether poisonous or not; and the consequences of modes of treatment esteemed dangerous by the profession, since such knowledge falls within the line of his calling, and forms part of the skill belonging to it. Thus, where a person undertaking the cure of a disease (whether he has received a medical education or not) is guilty of gross negligence in attending his patient, after he has applied a remedy, or of gross rashness in the application of it, and death ensues in consequence of either, he is liable to be convicted of manslaughter.[1] But the death and the treatment should be so connected with each other as to stand in the relation of cause to effect; and, as in all cases of alleged guilt, innocence is to be presumed until the contrary be proved, the defendant is entitled to the benefit of any doubts which may arise in the premises.[2] It is always easier to accuse than to refute, particularly where the question turns upon the operation of physical laws, and the share which human art may have had in modifying the degrees of their activity. And as this is not a matter of *a priori* conclusion, being deducible from observation and experience alone, justice requires that the proofs of guilt should be established by as nearly indisputable facts as the nature of the

[1] Rex *v.* St. John Long, 4 Carr. & P. 398.

[2] Un docteur en medecine ne peut être déclaré coupable d'homicide par imprudence pour avoir causé la mort d'un de ses clients par un medicament prescrit à tort, et sans une connaissance assez exacte de l'état du malade, s'il n'est point établi que la mort soit due à l'emploi de ce médicament. *Aff. Signoret, Jour. du Pal.* vol. 46, p. 660, 1846.

inquiry permits. Nothing demonstrable should be left to conjecture; nothing questionable should be accepted upon the dogmatic assertion of witnesses, since the testimony of one mind, founded only upon individual experience, and unsupported by others, is too small a contribution to the field of human knowledge to be considered as a determinate conclusion, admitting of no doubt.

§ 78. In the case of Rice *v.* The State,[1] Scott, J., *pro curia*, said, "If a person assumes to act as a physician, however ignorant of medical science, and prescribe with an honest intention of curing the patient, but, through ignorance of the quality of the medicine prescribed, or of the nature of the disease, or both, the patient die in consequence of the treatment, contrary to the expectation of the person prescribing, he is not guilty of murder or manslaughter. But if the party prescribing have so much knowledge of the fatal tendency of the prescription that it may be reasonably presumed that he administered the medicine from an obstinate and willful rashness, and not with an honest intention and expectation of effecting a cure, he is guilty of manslaughter at least, though he might not have intended any bodily harm to the patient."

Lord Coke, in his fourth Institute, 251, says upon this point, "If one that is of the mystery of a physician take upon him the cure of a man, and giveth him such physic as he dieth thereof, without any felonious intent, and against his will, it is no homicide. Briton saith, that if one that is not of the mystery of a physician undertakes the cure of a man, and he dieth of the potion or medicine, that is covert felony."

§ 79. The soundness of this distinction between licensed

[1] 8 Missouri, 561; Comm. *v.* Thompson, 6 Mass. 134.

and unlicensed physicians was very early denied by Sir Matthew Hale,[1] upon the ground that physic and salves were in use before licensed physicians and surgeons existed. Blackstone coincides with Hale, and rejects the distinction between licensed and unlicensed physicians in relation to their professional responsibility, in the following words:

"If a physician or surgeon gives his patient a potion or plaister to cure him, which, contrary to expectation, kills him, this is neither murder nor manslaughter, but misadventure, and he shall not be punished criminally, however liable he might formerly have been to a civil action for neglect or ignorance; but it hath been holden that, if it be not a regular physician or surgeon who administers the medicine, or performs the operation, it is manslaughter at the least; yet Sir Matthew Hale very justly questions the law of this determination."[2]

§ 80. Again, if a person bona fide and honestly exercising his best skill to cure a patient perform an operation which causes the patient's death, he is not guilty of manslaughter, and it makes no difference whether such a person be a regular surgeon or not, nor whether he has had a regular medical education or not.[3] It is the presence of intention which determines the moral complexion of an action, and wherever this intention (always presumed to be good) is proved to be bad, then and then only does a party become criminally responsible for his wrong doings. Doubtless a bad intention may at times be inferred from the character of the misconduct; and *negligence*, particularly when gross, may be classed among those reasons which justify such an inference. In Rex *v.* Spiller,[4] it

[1] 1 P. C. 423.
[2] Blacks. Comm. Bk. 4, c. 14.
[3] Rex *v.* Van Butchell, 3 Carr. & P. 629.
[4] 5 Carr. & P. 333.

was held that "Any person, whether a licensed medical practitioner or not, who deals with the life and health of any of his majesty's subjects, is bound to have competent skill, and is bound to treat his or her patients with care, attention, and assiduity, and if a patient dies for want of either, the person is guilty of manslaughter." This was an affirmation of the doctrine asserted in the case of Rex *v.* St. John Long, where it was laid down that "a person acting as a medical man, whether licensed or unlicensed, is not criminally responsible for the death of a patient occasioned by his treatment, unless his conduct is characterized either by gross ignorance of his art, or gross inattention to his patient's safety."[1]

And in an equally celebrated case against the father and founder of the botanic system of practice, it was held that, "If a person assuming to be a physician, through gross ignorance, but honestly and *bona fide*, administers medicine which causes the death of the patient, he is not guilty of manslaughter."[2]

CONTAGIOUS DISEASES.

§ 81. The physician has public as well as private duties to discharge in the practice of his profession. In the obligations flowing out of the former, he is in some sense a health officer, and his duty is not only to combat disease in any individual patient, but to suggest and adopt appropriate means to check its spread, wherever that disease is of a contagious or infectious nature. Hence, it is the duty of physicians who are attending patients infected with infectious diseases, when called to attend other

[1] 4 Carr. & P. 398.

[2] 4 Comm. *v.* Thompson, 6 Mass. 134.

patients not so infected, to take all such precautionary means as experience has proved to be necessary to prevent its communication to them. And the fact that a physician who was called in was warned that if he attended any patients infected with the small-pox, his services would be dispensed with, and another employed, failed to deny that he was attending such patients, and promised not to do so, but continued to attend, and did communicate small-pox to the patient, was proper evidence to go to the jury, on a suit to recover the charge for attention, to reduce the damages.[1] Likewise in the same case, it was held that a physician who communicates to his patient an infectious disease is responsible for the damages of the suffering, loss of time, and danger to which the patient may be subjected. And the defendant, in an action by a physician to recover for his services, may reduce the recovery by pleading and proving that the physician communicated an infectious disease to his family, and thereby his attendance was protracted, and his bill increased.[2]

What was said of small-pox in the above case will apply with equal force to *puerperal* fever, so that physicians attending upon patients affected with this latter disorder should avoid visiting parturient women, or they may be made responsible in damages for the consequences of communicating it to them.

Nor is the responsibility less in cases of *vaccination*, where the physician, while he does not guarantee the *specific* value of the vaccine virus, yet guarantees its *freshness*, so that if he inoculate a patient with virus in an altered stage, constituting, as it then would, mere putrid animal matter and erysipelas, or any injury to a limb

[1] Piper *v.* Menifee, 12 B. Monroe, 467. [2] Ibid.

arise, requiring its amputation, he will undoubtedly be held responsible for the suffering, loss of time, and permanent injury to the patient.[1]

On the other hand, it may be asked whether a physician has no remedy against a patient who, by fraudulently concealing an infectious disease, and inducing the physician to expose himself to it, communicates it to him? In two cases that have come under our notice, physicians making digital examinations of females in obedience to uterine necessities, supposing them all the while to be free from syphilitic disease; and their inquiries to that effect, of the husbands of these persons being answered in the negative, became infected, and for several weeks were disabled from practicing. Could these be called ordinary professional risks in the line of a physician's daily duties, and for which he has no remedy against the party infecting him? It seems clear that the disease, having been fraudulently concealed, and being, from the part of the body where most active, not always amenable to inspection, the physician could not exercise any professional acumen, previous to the digital examination, but had to rely exclusively upon the statements of the patient. Being thus induced by false representations to undertake that which he might have avoided, had any choice been allowed him, and serious damages thereby accruing to him, there is no escape from the conclusion that an action on the case would lie as against the patient.

[1] Landon *v.* Humphrey, 9 Conn. 209.

CHAPTER V.

DUTY OF PATIENTS.—CONTRIBUTORY NEGLIGENCE.—APPORTIONMENT OF RESPONSIBILITIES BETWEEN PHYSICIANS AND SURGEONS.—SUPERINTENDENTS OF ASYLUMS FOR THE INSANE.—MEDICAL SOCIETIES.

§ 82. The services rendered by physicians to patients consisting in the treatment of the bodies of free, rational beings, these can not be looked upon as simply *objective* substances upon which to practice the art of medicine. The patient has not alone the objective duties of acquiescence to discharge towards his medical adviser, but the further and more important *subjective* duties of co-operation and assistance. While remaining objectively passive, he must still at all times, and so far as in his power lies, exert himself actively to co-operate with the physician in carrying out upon his own person the commands of the latter. By becoming a patient, he does not divest himself of his rational character, nor sink into the condition of a mere animal organism. He must obey primarily, but he is also required to exercise his reason in such a way as to further the object of the treatment to which his body is being subjected. To that extent he becomes the special agent of the physician by a legal paradox, which recognizes him both as a principal, or mandator, and an agent *quoad hoc*, to assist the mandatary in discharging his trust. This relation should never be lost sight of, for it constitutes a species of *shifting* trust, where the *onus probandi* in case of alleged dereliction of duty, may be made to pass from one party to the other.

§ 83. As it is of the first importance to the successful treatment of any case that the patient should wholly submit himself to the guidance of his medical adviser, so if he will not, or can not, it is either his own wrong or his own misfortune, and for its results he has no one to blame but himself.[1] In such cases the burthen of responsibility is plainly shifted from the physician to the patient, and the former ceases to be accountable for the ulterior consequences of a treatment which, though undertaken by him, has yet been interfered with and interrupted in the course of its execution. This is an eminently just doctrine, and founded upon the maxim that no man shall profit by his own wrong, nor does it matter in what form that wrong manifests itself, whether it consist in negligence, unwillingness, or inability to follow the physician's directions, or in a wrongful interference with his treatment for sinister purposes. In probably the largest number of cases of alleged malpractice, could the truth be known, it would be found that deviations and departures from the strict line of duty on the part of patients, had been the starting-point of a series of mischievous results, for which, it is afterwards, and unjustly, sought to throw the blame upon the physician.

[1] It is the duty of the patient to co-operate with his professional adviser, and to conform to the necessary prescriptions; but if he will not, or under the circumstances he can not, his neglect is his own wrong, or misfortune, for which he has no right to hold his surgeon responsible. No man may take advantage of his own wrong, or charge his misfortune to the account of another. And a surgeon is not responsible for injury resulting to a patient from failure to conform to proper directions given by him, where such failure arises from unwillingness or inability on account of pain. McCandless *v.* McWha, 22 Penn. St. R. 268.

If the patient does not follow the prescription and co-operate with the surgeon, he can not afterwards call the surgeon to an account for any unfortunate result that may attend the case. Elwell on Malpractice, 31.

Thus, a medicine is prescribed containing some poisonous substance, which, in properly divided doses, and with proper intervals of time, is not only innoxious, but beneficial to the patient. He is ordered to take it at those intervals only, *and until relieved.* Now, if he takes it any oftener, or continues to take it after relief has been obtained, it is plainly a violation of the physician's directions, and from that moment he exonerates him from all responsibility for its ulterior consequences. Most of the medicines, in fact, which are prescribed to be taken in divided doses might, if taken as a whole, cause death, and in any case of this kind it would be manifestly unjust to lay the blame upon the physician, since what he prescribed may not have been a poison as ordered to be taken, but became so only through the direst misapplication of it by the patient. And the moment this latter sets up his own judgment in contravention to that of the physician, he frees him from all personal liability for whatever consequences may ensue from such wrong doing. But there is no escape by showing contributory negligence in the patient, provided the prescription was noxious *ab initio*, and its effects did not arise cumulatively, and from too frequent or unauthorized repetition by the party injured; because the duty of professing skill and exhibiting correctness in prescribing is not created by contract, but by law.

Or again, for example, a bandage slackened, or a splint displaced by a patient for the purpose of relieving present discomfort, though subsequently replaced by him with the greatest care, may yet have disturbed a provisional callus, and irrevocably impeded a perfect apposition of the ends of fractured bones, thus insuring as an inevitable consequence shortening of the limb. Or,

again, an omission to maintain a particular position to give support to a wounded part, to preserve a particular temperature, or to exercise persistently certain muscles or joints, with a view to re-educate them into flexibility, such omissions on the part of the patient to do for himself what the physician can not do for him, are all cogent arguments against the responsibility of the latter for the shortcomings of the former. The result of such conduct, however disastrous to the patient, and although he may concurrently with his wrong doing be under the care of a physician, can be charged only to his own account. It becomes a species of *felo de se* in the truest sense, for which none but himself is responsible.

CONTRIBUTORY NEGLIGENCE.

§ 84. The trust reposed in the patient, that he will obey and follow the physician's directions, so as to co-operate practically in his own treatment, is one which necessarily flows out of the relation subsisting between them. Any act of his, therefore, which infringes this trust, is, to that extent, an assumption of personal responsibility for all immediate and ulterior consequences thereby ensuing. In submitting himself to the care of a physician or surgeon, he impliedly agrees to acquiesce in any rules of personal conduct which the latter may prescribe, as a part of his professional treatment, precisely as a passenger on a steamboat or railway carriage is subject to rules of restrictive deportment; and in either case, if the passenger or the patient incur damage by reason of violating any such rules, the wrong and the blame are exclusively his own. The breach of this trust of obedience and co-operation

places him outside of the pale of any legal remedy, for in such cases he is presumed to act upon his own responsibility. Even though at such a time the physician should himself be guilty of negligence, it would not tend to purge the patient of his delinquency, or revive his expired rights, for one can not recover damages for an injury caused *concurrently* by his own negligence, and the negligent or unskillful acts of the party sought to be charged.[1] But the rule that the plaintiff can not recover where his own fault contributed in any degree to the injury, is to be applied with caution, whenever the fault of the defendant is clearly established.[2]

Thus, in an action for damages for injuries caused by improper, negligent or unskillful surgical treatment, if the injury has been caused proximately, partly by the negligence or unskillfulness of the defendant, and partly by that of the plaintiff or others, the action can not be maintained. The negligence is a question of fact, or of mixed law and fact, to be left to the jury, and where the jury find a verdict for the plaintiff, this must be regarded as settling the question in his favor.[3]

The patient may, however, dismiss the physician at any stage of the treatment without any previous notice,

[1] Heil *v.* Glanding, 42 Penn. 493; Haley *v.* Earle, 30 New York, 208.

[2] Clark *v.* Kirwan, 4 E. D. Smith, 21.

[3] Chamberlin *v.* Porter, 9 Minn. 260.

The general doctrine of *contributory negligence* is this, viz. "That, although there may have been negligence on the part of the plaintiff, yet, unless he might, by the exercise of ordinary care have avoided the consequences of the defendant's negligence, he is entitled to recover; if, by ordinary care he might have avoided them, he is the author of his own wrong." Smith *v.* Smith, 2 Pick. 621; Parker *v.* Adams, 12 Metc. 417; White *v.* Winnesimmett Co. 7 Cush. 155; Holly *v.* Boston Gas Light Co. 8 Gray, 131.

As to what is *ordinary* care, see Shrewsbury *v.* Smith, 12 Cush. 177; Shaw *v.* Boston and Worcester R. R. 8 Gray, 79.

or assigning any reasons therefor; because the contract on his part being for no stipulated time, he is at liberty to rescind it whenever he may judge proper. This would unquestionably release the physician from all responsibility for the results of his treatment occurring after the case had passed out of his hands, particularly if another physician had assumed the care of the patient previously to the manifestation of such results. But dismissing the physician does not of itself release him from responsibility for misconducting the case during the period of his attendance, and causing injuries which have compelled the patient from motives of self-preservation to call in another medical attendant. He is still, and continues to remain, liable for whatever wrongs are directly traceable to his agency.

APPORTIONMENT OF RESPONSIBILITIES.

§ 85. The object of medical services being the restoration of health, or the alleviation of suffering, there can be no reasonable distinction between the responsibility of a physician and that of a surgeon. The end contemplated by the labors of either is analogous, and the contract varies only in the instruments by which it is carried out. Both must possess and employ skill and judgment in the care of their patients, for the care of the sick, subsequent to operations, requires of the surgeon as much experience in practical medicine as he may have exhibited in operative surgery. His labors, therefore, cover a wider field than those of the mere physician, since he combines both sciences of surgery and therapeutics in his practice. Every surgeon publicly announcing himself as such, when

called to treat a patient requiring an operation, unless he restricts his contract *specially* to the performance of the operation, and nothing more, is under a similar obligation as the physician to carry the case out to its legitimate conclusion. This is not the case contrariwise with the physician. He may decline operating, after having otherwise treated his patient skillfully, because custom has so generally separated the two sciences, that one may be a skillful physician without being an equally skillful surgeon, and this deficiency will not be chargeable to him as a want of ordinary skill, and a fraud upon the public.

Yet, notwithstanding this general analogy of responsibility on the part of physicians and surgeons, the majority of suits for malpractice have been brought against surgeons as though they alone could commit wrong, while the physician, if equally culpable, generally escapes. This fact will not appear strange when it is remembered, that the labors of the surgeon and their results are of a more patent character than those of the physician. His operations are either very brilliant and successful, or else very unsuccessful and profitless. In this latter event only the scars and deformities are remembered, while the good intention and the difficult undertaking are both alike forgotten. Failure is rarely excused in a surgeon. In contradistinction to the physician, he is expected to be an adroit medical carpenter, who, with knife, and saw, and splint, can so reconstruct the fractured or disjointed members of the human body as to leave no mark or line as evidence of their previous disruption.

§ 86. On the other hand, the physician, enshrined within the penetralia of his mystic art, and mounted upon a Delphic tripod inaccessible to vulgar criticism, pronounces his diagnoses and formularizes his prescriptions

with unquestioned judgment. His diagnosis may be faulty, his medicines ill-selected, or ill-timed in their administration, and still no blame be incurred by him for any evil consequences which may ensue. For, who will presume to say, in case of the patient's death, that he had not naturally reached that "last illness" foreordained to all men, and of which the physician's unsuccessful treatment is only official testimony? Who knows in fact when a man has reached his last illness until he dies? "It is appointed unto all men once to die," and our mother earth (justissima tellus) often covers with a charitable pall the errors of her children as well as their bones. And since, in a case of supposed medical malpractice, the plaintiff can no longer present himself, as the *corpus delicti*, to be viewed in connection with certain alleged wrong-doings affecting his health and life, it becomes almost impossible to obtain any certain testimony upon which to support a suit. And as a corollary to this, strange as it may seem, one might, through unskillfulness, sacrifice a human life with more impunity than he could mutilate or deform a toe or finger.

CONSULTING SURGEONS.

§ 87. But as between surgeons themselves, a question often arises touching the degree of responsibility of a *consulting* surgeon, called in to counsel with, or superintend the treatment pursued by another surgeon. This will depend necessarily upon the relation in which he places himself towards the patient. If he be called in but once, and for the purpose of counselling alone, it is clear that his contract and his responsibility both termi-

nate with his visit. He is subordinated to the attending surgeon in the application of whatever treatment he may direct, since the latter, by adopting it, both endorses and makes it his own, and still retaining the exclusive management of the case, retains the right to apply the advice according as his own judgment shall direct, for the advice might be applicable to-day and not so to-morrow.

§ 88. Again, if the consulting surgeon be called in for the purpose of performing an operation, and does perform it, he gives a new direction to the case, and becomes responsible for the immediate effects of such operation; but after he has handed over the case, at a safe stage of its treatment, to the attending surgeon, his responsibility clearly ceases. On the other hand, if, being originally called in to counsel, he consents to undertake the treatment of the case in connection with the attending surgeon, he thereby constitutes himself a principal in the transaction, while the latter acts as his agent, and upon the general principles regulating this relation, he becomes responsible for the results of that agent's treatment, wherever those results flow directly from the legitimate exercise of his duties. But where a physician and a surgeon act together on an entire equality in the management of a case, and there is negligence which can not be personally apportioned, they may be sued jointly.[1]

It is plain, however, that the criminal acts of an agent do not bind his principal, although the latter might be liable for acts of such gross negligence, hebetude, or unwarrantable undertaking on the part of that agent as would imply an inexcusable ignorance of the canons of his art. For, in appointing an agent, he becomes a guar-

[1] Slater *v.* Baker and Stapleton, 2 Wils. 359.

antor of his qualifications towards the public in all such matters as come within the purview of his trust.

§ 89. It is often the case, also, that physicians send their students to perform operations in minor surgery, or to attend upon patients at the bedside, and in so doing there is no doubt that they incur responsibilities for the manner in which these delegated duties are performed. The student is merely the agent of the physician, and his errors, should he commit any, become those of his principal. Hence, if he vaccinate with unsound matter, or leech, or cup, or bleed in such an improper manner as to cause injury, the physician, whose agent he is, becomes liable to the injured party.[1] It cannot be too often repeated, nor too emphatically stated, that the service which a physician is called upon to render is a *personal* trust, the moving consideration to which is his individual skill and judgment. In contemplation of law, therefore, the service cannot be transferred by him to another without the permission, express or implied, of the patient. *Delegatus non potest delegare.* Either he has charge of the case or he has not. If he has, then he is responsible for his own acts and those of his agent, done under his authority and command. For, even though the patient acquiesce in being treated by the agent, it is still only the treatment of the principal, for whose convenience the agent has been acting. And *qui facit per alium facit per se.*

[1] Landon *v.* Humphrey, 9 Conn. 209.

A surgeon is responsible for an injury done to a patient through the want of proper skill in his apprentice; but in an action against him the plaintiff must show that the injury was produced by such want of skill, and it is not to be inferred. Hancke *v.* Hooper, 7 Carr. & P. 81.

IMMUNITY BONDS.

§ 90. It is often asked whether a surgeon may not shield himself from responsibility for the results of his treatment, by requiring in advance from his patient a bond, covenanting not to sue for damages, in case deformity, or permanent loss of use in a limb, follows an injury which he has been called upon to treat. It is clear upon general principles that the law, not considering the physician a guarantor of cures, and not holding him, consequently, liable for inevitable results occurring in the natural course of diseases, no immunity bond can ever be necessary to him. Besides which, such an instrument would, in reality, be worthless, because in its very nature against public policy. For it is against that spirit of equity which should regulate the transactions of mankind, to allow any one to contract for exemption from the legal consequences of his own wrongful acts; and to no other acts do legal consequences, in the nature of penalties, attach. Hence, no physician, by any special contract, can exonerate himself from responsibility for either not doing, or not doing well, his duty towards a patient. With or without such a bond he may still be prosecuted for malpractice. And certainly, it is a derogation of his dignity, and an attempt on his part to pervert the equitable streams of jurisprudence, to demand an instrument which shows upon its face that the physician had no confidence in his own skill, nor in the honesty of the patient. It is better far to refuse the case than to take it with such a defilement of the trust.

SUPERINTENDENTS OF LUNATIC ASYLUMS.

§ 91. The custody of patients, as in lunatic asylums and hospitals, essentially imparts to the physician having them in charge very extensive discretionary powers. These powers, including as they do the control of the person, and a restriction of his liberty, constitute a solemn trust, and are to be exercised only as means to an end, and in the strict discharge of professional duties. At common law, and in the constitutions of the several States of the Union, the personal liberty of the citizen is especially guaranteed; nor can he be deprived of that liberty without due process of law. To receive, therefore, the custody of any patient, either in a public or private lunatic asylum, and to deprive him of his liberty without a previous commitment duly issued from a source of competent authority, constitutes an imprisonment which, being false, is to that extent illegal, and thus renders the party liable to an action of tort. And it is no answer on the part of the defendant that the custody is only incidental to the treatment, for he is still bound to show that such custody was legally obtained. Nor can it be matter of inference from the nature of the disease or the character of the institution.

§ 92. While it is admitted to be often, if not generally, necessary to the successful treatment of the insane, that they should be placed in the custody of superintendents of asylums, the right to receive and detain such persons without due process of law first issued for that purpose, will depend upon the violence of their conduct, and the danger to themselves and the public which might ensue from any delay in confining them. Society always has the right to protect its members against violence addressed

to their own persons or that of others, without waiting to issue a process, pending which, the very act sought to be avoided by it might be committed. Delay in such cases might be fatal. Like any other impending evil to life, limb, or property, a violent lunatic may therefore be arrested and confined by any person. But this authority, *publici juris*, is limited to the actual necessities of the moment, and although correctly enforced at the outset, imparts on this account no right of indefinitely continuing such custody. And, as soon as possible after the arrest, judicial proceedings must be instituted, in order to certify to the justice of such detention, and exonerate the party making it from liability for false imprisonment. The request of relatives, wives, or husbands, for the immediate confinement of a lunatic without due process of law, who does not exhibit violent or dangerous conduct towards himself or others, will not justify any person in restraining him of his liberty. The mere exhibition of symptoms of insanity deprives no man of his civil rights until a competent tribunal has adjudged him to be *non compos mentis*. And until this fact be established, only violence of conduct and presumable danger to himself or the community will authorize a summary interference with his personal freedom. The law, representing the legislative will of society, can alone abridge the freedom of the citizen, and even then, except when dangerous to society, he can not be arrested without a discriminating process, indicating the grounds of such arrest, and committed for its execution to the hands of a proper officer. Hence, the right to commit another, whether relative or not, into the custody of a lunatic asylum, without due process of law, is vested in no man, and the physician receiving such a person into his custody is liable to an action for false imprisonment.

§ 93. Remembering also the fact that the custody, even when legally obtained, is incidental to the treatment, as the treatment in turn is to the disease, the question naturally arises, if the committal is indefinite in its limitation of time, how long the physician can, with safety to his own rights, detain the patient? If the custody depended upon any thing besides the disease, it is plain that the right of detention would be modified by something more than the patient's state of health; but inasmuch as this is the sole and exclusive cause and justification for imposing restraints upon his personal liberty, the very moment there is such an amelioration of health as not to render his confinement absolutely indispensable to public safety, the right to restrain him of his freedom expires by limitation and *ex vi termini*. The physician then is obliged to discharge him, without any regard to the wishes or prejudices of friends, otherwise he detains him at his peril. The physician acts only in his capacity of custodian, as a *ministerial* officer to execute the process of the law so long as there is a cause for such process to exist, that cause being the patient's state of disease. Of this latter he is permitted to be judge; but whenever such cause ceases to exist, his authority to restrain ceases also, and he becomes transformed into a trespasser if he continues to hold the person in custody.

§ 94. On the other hand, while the safe-keeping constitutes an undoubted part of the treatment, the physician is not liable in damages if, without any negligence or connivance on his part, the patient escapes from his custody. For the latter, whatever may be the degree of his intelligence, is still, in contemplation of law, a human being, with more or less powers to *will* and to *act*, and his safe-keeping therefore can never be put upon the same

footing as that of an inanimate object. Nor even, should he commit suicide while in such custody would the physician be liable, unless he had in some way contributed to the commission of the act.

§ 95. Insanity being a disease, and not an offence at law, the discharge of an alleged lunatic from custody under a writ of *habeas corpus*, because improperly held, does not preclude the right of future restrictions upon his personal liberty, if at any time there shall be sufficient proofs adduced of his insanity to justify the issuing of process to that end. The same physician from whose custody he had previously been removed, may retake him under his control, without incurring any additional liability on account of his previous discharge. For, every new occurrence of mental disorder may create a necessity for his sequestration, to be determined by proper legal inquiry; and this fact having been affirmed, he may be committed under due process, to the keeping of any competent person, irrespective of a past discharge. But a physician, whatever his position, official or otherwise, has no more authority than any other citizen to order into custody an alleged lunatic, unless such person had previously been entrusted to his keeping by due process of law, and afterwards escaped.[1] And, in an action of trespass for assaulting and imprisoning the plaintiff, and forcing him to go along certain public streets, the parties doing so, alleging as their authority the written command of a physician "authorizing the bearer to take charge of the plaintiff, and confine him to his own house, he being insane."

Lord Tenterden said, "It is admitted on both sides that your verdict must be for the plaintiff, and the only question is, as to the amount of damages which you are

[1] Shelford's Lunacy, p. 400.

to give; and, with respect to this point, it is material to consider that the plaintiff was taken on suspicion of his being insane. Certainly the course taken by the doctor has been such as cannot by law be justified. He ought not to have sent two men with such instruments as these appear to have been sent with, merely upon statements made by relations, unless those statements were such as to satisfy him that those steps were necessary to prevent the party from doing some immediate injury either to himself or others. From the statement made by the doctor, when the parties were before the magistrate, it seems that it is usual, on the application of the family, to act in this manner. I confess I am sorry to hear it so said, for it certainly is not right, and although there may be difficulty in getting access to a party laboring under insanity, yet, the proper course is, if access cannot be obtained, to apply to the high authority which has cognizance over such matters, to get the party taken up, in order that he may be examined."[1]

§ 96. The general principle is everywhere recognized that however insane a party may be, no one has a right to confine him for *an indefinite period*, except by due process of law issued by a tribunal of competent jurisdiction. On this point Chief Justice Gilchrist expressed himself most emphatically, in the words following: "Such an authority is possessed by no person, unless under the sanctions, and after compliance with, the forms of law. No relationship, however near, no ties of friendship, however close, between the lunatic and his keeper, would render the existence of such a rule consistent with the safety of the community. Every cage would be a licensed private mad-house, and added to the nameless and unimaginable

[1] Anderdon *v.* Burrows et al. 4 Carr. & P. 210.

horrors which have been brought to light in such establishments in England, even under the treatment of medical men, and regulated by acts of Parliament, would be the further evil that each individual keeper would be irresponsible."[1]

Yet, in the same decision, the following principles are enunciated, as sensibly modifying the absolute rule relating to the immunity of the person from arrest.

1*st*. That if a person be so insane that it would be dangerous to suffer him to be at liberty, *any person* may, from the necessity of the case, without warrant, confine him for a reasonable time, until proper proceedings can be had for the appointment of a guardian.

2*d*. That if it be dangerous to permit an insane person to be at liberty, and he be confined, and before measures can be taken for the appointment of a guardian he became sane, and be released, the party confining him will not be a trespasser.

3*d*. That in trespass for imprisoning the plaintiff, who was then insane, the defendant may show in mitigation of damages, that he made inquiry whether it would be safe to permit the plaintiff to be at liberty, and was told by the plaintiff's friends and neighbors that it would not, and that he seemed desirous to take the best course for the plaintiff and his family.

§ 97. These views, founded in a humane and philosophical estimate of the duty which society owes to itself as well as to the insane, and pointing out, as they do, that happy mean of conduct which both protects the lunatic, and ensures him the best means of recovery, allows of his arrest only as a provisional course precedent to the more complex formalities which are intended to follow imme-

[1] Colby *v.* Jackson, 12 N. H. 526.

diately, in the determination of the question at issue. It is against *indefinite detention* without previous sanction of authority that the law interposes its shield. But aside from this, the rule authorizing temporary detention of a party for cause suspected, and afterwards to be supported by evidence, does not essentially differ in cases of insanity from other cases justifying arrest, since they all come under the general principle of *salus populi suprema lex*. And any party, if unlawfully detained, has always his remedy against the trespasser for false imprisonment.

§ 98. In a petition for a writ of *habeas corpus*, before the Supreme Judicial Court of Massachusetts, to procure the discharge of Josiah Oakes, who was committed to the McLean Hospital for the Insane, Chief Justice Shaw said, "It has been inquired by what power he is there confined? It has been argued that the constitution makes it imperative upon the court to discharge any person detained against his will; and that by the common law no person can be restrained of his liberty except by the judgment of his peers, or the law of the land. But we think there is no provision either of the common law, or of the constitution, which makes it the duty of the court to discharge every person, whether sane, or insane, who is kept in confinement against his will. The provision, if it be true, must be general and absolute, and not governed by any questions of expediency to suit the emergencies of any particular case.

"The right to restrain an insane person of his liberty, is found in that great law of humanity, which makes it necessary to confine those who, going at large, would be dangerous to themselves or others. In the delirium of a fever, or in the case of a person seized with a fit, unless this were the law, no one could be restrained against his

will. And the necessity which creates the law, creates the limitation of the law. In the case of an application to have a guardian appointed over the person and estate of an insane person, under the statute, some time must necessarily elapse before the appointment can be made, and during that time restraint may be necessary. If there is no right to exercise that restraint for a fortnight, there is no right to exercise it for an hour. And if a man may be restrained in his own house, he may be restrained in a suitable asylum under the same limitations and rules. Private institutions for the insane have been in use, and sanctioned by the courts; not established by any positive law, but by the great law of necessity and humanity. Their existence was known and acknowledged at the time the constitution was adopted. The provisions of the constitution in relation to this subject must be taken with such limitations, and must bear such construction as arise out of the circumstances of the case. Besides, it is a principle of law, that an insane person has no will of his own. In that case it becomes the duty of others to provide for his safety and their own. But whose duty does it become? If we say of his children, he may have no children; if of his parents, brothers or sisters, he may have no relations who can perform the duty. Those who are about him must exercise it. His children, his wife,[1] his brothers, or sisters are suitable persons to take charge of him if they are at hand. But a stranger in a hotel or boarding house may become delirious. In that case it becomes incumbent on those about him to restrain him, for

[1] On this point Mr. Shelford (on the Law of Lunatics, p. 140,) thus expresses the actual state of the law in England: "Unless there exist strong reasons for exclusion, the custody of the person of a married man *non compos*, will be committed to his wife, and the custody of a married woman *non compos*, to her husband. Ld. Wenman's case, 1 P. Wms. 701.

such time only as the necessity for such restraint continues. The same rule may apply in the case of some surgical operations, where a person can not have any will of his own, and it becomes necessary that he should be held by others.

"The question must then arise in each particular case, whether a person's own safety, or that of others requires that he should be restrained for a certain time, and whether restraint is necessary for his restoration, or will be conducive thereto. The restraint can continue as long as the necessity continues. This is the limitation, and the proper limitation. The physician of the asylum can only exercise the same power of restraint which has been laid down as competent to be exercised by others in like cases."[1]

These views of C. J. Shaw were fully confirmed by the Supreme Court of Pennsylvania in the case of *Hinchman* v. *Richie*,[2] where Burnside, J., substantially repeated the same principles, at the same time quoting one of the most significant passages of the Massachusetts decision.

MEDICAL SOCIETIES.

§ 99. Medical societies or corporations, being creatures of legislative enactment, their rights, powers and duties are matters of strict definition. Within the constitutional limitations of the authority creating them, they may exercise any and all powers granted them by charter, to which instrument, and the constitution of the State granting the franchise, reference must always be had for determining the true extent of their powers.

[1] Law Reporter, vol. 8, page 122.
[2] Brightly R. p. 145.

In the United States their rights are, in general:

1st. To enjoy a given name.

2d. To have and use a corporate seal.

3d. To prescribe rules for the admission and expulsion of members, and the election of officers.

4th. To sue, and be sued.

5th. To purchase, hold, and sell property.

6th. To impose fines and penalties on their members.

In England these societies enjoyed anciently much more extensive powers than any ever granted in this country, and even assumed the power to imprison members, or persons practicing medicine without license within their jurisdiction.[1]

The provisions of the revised statutes of New York giving to county medical societies the right to try members for ignorance, misconduct, or immorality, and expel them therefor, have been held not to be unconstitutional. And in furtherance of this principle it has been decided that, a medical society is not precluded from preferring charges against a physician, by the fact of having once

[1] The following cases from the English Reports may be consulted upon this subject: Goddard *v.* Coll. Physicians, *mandamus*, 1 Lev. 19; Letch *v.* Coll. Physicians, *mandamus*, 4 Burr. 2186; R. *v.* Askew, *quo warranto against censors*, 4 Burr. 2195; Archer *v.* Coll. Physicians, *mandamus*, 5 Burr. 2740; Stanger *v.* Coll. Physicians, *mandamus*, 7 T. R. 295; Coll. Phys. *v.* Levett, *debt*, 1 Ld. Raymond, 472; Coll. Phys. *v.* West, *license, extent of territory*, 10 Mod. 353; Bonham *v.* Coll. Phys., *false imprisonment*, 8 Coke, 107; Laughton, Prest. &c. *v.* Gardner, *debt*, Cro. Jac. 121; Atkins *v.* Gardiner, *debt*, 1 Brown & Gould, 93; Coll. Phys. *v.* Butler, *debt*, Litt. 168; Coll. Phys. *v.* Tenant, *debt*, 2 Bulstr. 185; Coll. Phys. *v.* Bush, *debt*, 4 Mod. 47; Coll. Phys. *v.* Talbois, *debt*, 1 Ld. Raymond, 153; Coll. Phys. *v.* Salmon, *debt*, 1 Ld. Raymond, 680; Coll. Phys. *v.* Huybert, *action qui tam*, Goodall, 261; Coll. Phys. *v.* Needham, *action qui tam*, Goodall, 273; Coll. Phys. *v.* Harrison, *action qui tam*, Goodall, 301; Coll. Phys. *v.* Alphonso, *habeas corpus*, 2 Bulst. 259; Coll. Phys. *v.* Groenvelt, *habeas corpus*, 1 Ld. Raym. 213.

before refused to prefer the same charges. In such proceeding the society are but accusers, like a grand jury, and may receive additional testimony, or reconsider the case, and change their determination upon the original evidence.[1]

But the power given by statute, to medical societies, to make by-laws and regulations relative to the admission and expulsion of members, although conferred in general terms, is not an arbitrary, unlimited power. The by-laws, rules, and regulations are not to be contrary to, nor inconsistent with, the laws of the State. And a by-law must be reasonable, and adapted to the purposes of the corporation. Thus, a medical society established a tariff of fees for medical services to be performed by its members, and fixed a minimum salary to be received by any member who should be appointed to any public office, in a professional capacity, and adopted a resolution declaring that it should be dishonorable for any member of the society to accept any appointment, or perform any services contained in such tariff of prices, at a less sum than was therein specified. Subsequently, in pursuance of a by-law to that effect, a member was expelled for a violation of this regulation. Held, that the regulation was void, as being unreasonable, and against public policy, and contrary to law, and that the expulsion of the member was unauthorized and illegal.[2] Semble, also, that the code of medical ethics adopted by the by-laws of a county society is obligatory on members alone, and its non-observance previous to membership furnishes no legal cause either for exclusion, or expulsion.[3]

[1] *Ex parte*, Smith, 10 Wend. 449.

[2] Vide People *v.* Med. Soc'y of Erie county, 24 Barb. 570; vide also, *Ex parte* Paine, 1 Hill. 665; People *v.* Med. Soc'y of N. Y. 3 Wend. 426; *ibid.* 18 Wend. 539.

[3] Bartlett *v.* Medical Society, 32 N. Y., 187.

PART SECOND.

MEDICAL EVIDENCE.

CHAPTER I.

OF THE NATURE OF SKILLED TESTIMONY, AND WHAT PERSONS ARE EXPERTS.—THEIR COMPENSATION.

§ 100. PHYSICIANS, when summoned before courts, may appear in a two-fold capacity, that is to say, either as *ordinary* witnesses, to state facts within their own knowledge, or as *skilled* witnesses to interpret them. In the former position their testimony differs in nothing from that of other persons, being subject to the same rules of admissibility and interpretation. Their profession imparts no additional value to their testimony in such cases, for it is clear that they simply testify to those matters to which any equally intelligent layman might. In these cases their testimony is restricted to matters of personal knowledge alone, and their opinions become inadmissible. It is well to understand this at the outset of the party's examination, and the physician, before taking the witness's stand, should know in which capacity he is called. Both capacities are, to a certain extent, often united in him, but, as a general rule, it is not usual to call an expert to

prove what an ordinary witness can, nor would he be allowed to, if no reason of a scientific character existed to justify it.

But, on the other hand, when he takes his place as an expert before a court, a legal paradox is instituted in his behalf, by which he is allowed to testify, not to what he knows, but to what he believes, or forms an opinion upon, based necessarily on probabilities of analogy as well as experience. His testimony becomes a generalization of facts, by means of which he undertakes to explain certain phenomena, or particular instances, as deductions from a law of common authority and government over such facts. He first generalizes, and then abstracts, and his opinion expresses the degree of agreement between a general law and the particular subject of its authority. And inasmuch as, in the government of the physical universe we have constantly disturbing forces to modify the action of individual laws, there will ever be innumerable *instantiæ migrantes* upon which to posit exceptions, and thus complicate the problems given him to solve. It is the best test of the value of his experience, that he is able to discover the seminal principle involved in the inquiry, to trace it through the most devious ramifications, recognizing its centric power through all external forms of expression, and, by a process of mental chemistry, analyzing all its combinations both quantitatively and qualitatively. Through such steps alone can he rise to a satisfactory interpretation of the phenomena of nature.

§ 101. In view of the immense erudition required to make a *skilled* witness in medicine, it follows that the high and responsible position occupied by the medical expert before courts of justice renders it indispensably

necessary for him to possess the greatest measure of proficiency in those matters about which he is called to testify. And though he need not be a schoolman, nor skilled like a lawyer in dialectics and rhetorical fencing, he should, at least, be able to distinguish between the real and the apparent, in those physical phenomena specially appertaining to that human nature of which he is the accredited minister and interpreter. Much of that wrangling over the taking of skilled testimony before courts, which constitutes the opprobrium of so many trials, may be attributed to a want of precision and candor in putting questions, and the consequent inability of witnesses to answer them clearly. When a witness can not so interpret the gist of a question to himself, as to comprehend the pivotal point of the inquiry, he can not answer it lucidly. He may give a constructive answer in very nearly the same words addressed to him. But this is answering the letter only of the inquiry, or following the lead of his interrogator, not expressing his own ideas, which, when a skilled witness, it is plain he was specially called to unfold. There being always an *arrierè penseé* to every question put by counsel, while the expert is confined to direct answers, his manner, whether brief and outspoken, or halting and ambiguous, is ever liable to be misinterpreted, according as it approximates to, or departs from the point intended to be reached by his examiner.

§ 102. There is on this account among physicians a great sensitiveness and reluctance about appearing before courts, for, besides being at times roughly handled in a cross-examination upon professional subjects by those of a different calling, their opinions are often disregarded by the jury, who pronounce a verdict directly antagonistic to

the current of their testimony. To be summoned to express an opinion in a case, and yet not have that opinion form part of the purport of the judgment, seems to many little short of an insult. But this view involves an entire misapprehension of the duties and scope of testimony of an expert. He should understand at the outset that he is not called to express any opinion upon the merits of the case; that he has no proper concern in the issue, and by whichever party called, he is in no wise the witness, much less the advocate of that side. His testimony is invoked in almost an impersonal sense, to explain the relations of cause and effect in certain physical facts that are in evidence before the court, and which relations, being unintelligible to the jury, require professional explanation at his hands in order that due weight may be given to the facts out of which they arise. His duties are properly limited to gauging the value of certain facts as they appear in evidence—facts whose importance to the issue can not be determined without his assistance.

But an opinion upon the relations of facts is not an opinion upon the truth of those facts. It is for him to decide the former; it is for the jury to decide the latter. For him to pronounce an opinion either upon the truth of the facts given him for interpretation, or upon the merits of the case, would be to usurp the province of the jury, and thus incorporate in his own person the functions of court, advocate, and witness.[1] It is, therefore, from no desire

[1] But here it must be observed that the witness can not in strictness be asked his opinion respecting the very point which the jury are to determine. For instance, if the question be whether a particular act for which a prisoner is tried were an act of insanity, a medical man conversant with that disease, who knows nothing of the prisoner, but has simply heard the trial, can not be broadly asked his opinion as to the state of the prisoner's mind at the time of the commission of the alleged crime, because such a question in-

to diminish either the importance or the value of medical testimony that courts are compelled to adopt such rules. And that they are wisely conceived must be apparent to all who will pause to inquire what would be the effect of allowing experts to usurp power, which they might be tempted to use for the benefit solely of the party calling them.

§ 103. In the examinationn of experts, it often happens that neither counsel nor witness understand one another, each using terms of various signification, according to the import most habitually given them by either profession. This necessarily produces ambiguity and confusion—a condition not undesired by him who seeks to make the worse appear the better reason, but always to be reprobated in a court of justice, where truth rather than victory should be sought after. For these reasons the testimony of experts, constituting a most responsible branch of the law of evidence, since it is something higher than a mere oral recitation of facts, being an opinion *ex cathedra* upon the value of such facts, and thus quasi-judicial, is jealously criticised to see that it is tainted by no bias towards either party. Under a distorted phraseology, the witness might easily be made to appear prejudiced, or, an undue emphasis placed upon a statement of subordinate consequence might elevate it into the sphere of a dogmatic assertion. Interpreting an idea as expressed through language, or construing that language

volves the determination of the truth of the facts deposed to, as well as the scientific inference from those facts. Yet he may be asked what judgment he can form on the subject, assuming the facts stated in evidence to be true. Taylor's Evid. p. 945; R. *v.* Wright, R. & R. 456; Rex *v.* Searle, 1 M. & Rob. 75; Fenwick *v.* Bell, 1 C. & Kir. 312; Beckwith *v.* Sydebotham, 1 Campb. 117; Collett *v.* Collett, 1 Curtis, 687; Malton *v.* Nesbit, 1 C. & P. 72; McNaughten's case, 10 Cl. & Finn. 200.

technically and etymologically, instead of in its usual and customary sense, may occasion wide differences of mutual comprehension, so that in fact, throughout the whole examination of an expert, more even than in the case of an ordinary witness, the doctrines of liberal rather than close construction should be applied. And since human language may be shown always to leave something to be interpreted outside of the words themselves, however construed, it follows that no precision, however great, can be absolutely perfect, and our only safeguard against interminable ambiguity and confusion rests in a liberal interpretation and construction.

§ 104. Lord Bacon has well and wisely said, that "the greatest trust between man and man is the trust of giving counsel."[1] And this trust may always be assumed to exist wherever special aid is given for the purpose of informing the judgment of others. It is not alone the province of lawyers to give counsel; physicians also, and any persons possessing special skill, may, and often do, act as such in trials at law, and their responsibility becomes none the less because that counsel is administered in the form of exacted testimony, rather than of spontaneous enunciation. Hence, testimony forming the evidence in every case constitutes its foundation. It is upon this alone that the issue is determined, and it is no wonder, therefore, that so much importance is attached to securing it as an unbroken chain of cumulative facts connecting the proof, as finally established, with the allegation as originally made. Remembering these things, we shall not blame lawyers for their zeal in keeping its links unbroken, or evincing heat in repelling attempts to break through it. "*Maximus tamen patronis circa testimonia*

[1] Essays "Of Counsel."

sudor est,"[1] is the significant language of the great teacher of oratory.

And there should be a corresponding degree of earnestness on the part of experts to throw light upon those difficult problems which they are specially called to expound. Their position also involves the dignity of their profession, as well as their own personal reputation, for they are truly advisers of the court, *amici curiæ*, rather than parties interested in the issue of the trial. This fact, it is painful to confess, is too much ignored both by counsel as well as courts, and the expert is constantly apt to be treated like an interested party, whose every word is tainted with the prejudice of a personal concern in the transaction. It would be better, were it possible, for the court alone to examine experts upon those points on which their professional opinions are needed, rather than to hand them over to counsel, each of whom has an interest in making their testimony aid his own side, and to that extent forcibly impressing upon it a unilateral character. But since this can not be, under existing modes of administering justice, the next best thing is to define accurately the authority, limits, and characteristics of skilled testimony.

§ 105. As all definite knowledge springs from the possession of facts corroborating previous conjectures, so evidence is the expression of a necessity of the human mind for all such facts as will enable it to form a conclusive judgment.[2] Without evidence, therefore, there can be no knowledge, and in order to secure it the law seeks for testimony either through the mouths of living

[1] Quintilian Inst. 5, 7.

[2] "L'esprit ne sait veritablement que ce qu'il voit avec évidence." Malebranche, Recherche de la Vérité, Liv. 13, c. 4.

witnesses, the agency of written instruments, material objects, and surrounding circumstances, or expressions of opinion predicated upon an acknowledged state of facts. These classifications, so far as they relate to human testimony, prepare us to see that all witnesses may be divided into two categories, viz., that of ordinary and that of *skilled* witnesses, or experts. The first category includes all persons competent to testify to any fact of which they have personal knowledge; the second defines such only as are skilled (periti) in some special science or art. As a general principle in the law of evidence, a witness is called for the express purpose of testifying to a fact within his own knowledge, and which fact must have come to him through personal observation, and not through hearsay. The former constitutes direct and absolute testimony, the latter only indirect, uncertain, and consequently unreliable testimony. The Roman law very appropriately stigmatizes it as *testimonium caecum*, and at common law it is universally rejected, except in matters of public opinion touching reputation.

In a treatise like this, restricted to medical evidence alone, it will be unnecessary to discuss the law of evidence as applicable to *ordinary* witnesses, for physicians, when summoned to act as such, stand on the same footing as all other persons. It is different, however, when they appear as experts, since the character and the value of their testimony is thereby entirely changed, the rules governing such testimony being framed to meet a new and exceptional state of things. And at the outset, it may be said that opinions, in general, are not evidence, for they are in plain and palpable violation of the germinal principle of all evidence, which is personal knowledge directly acquired. They are then either someth ng more or something less.

§ 106. The Roman law, it would seem, speaking of physicians when called as experts, evidently considered them more in the light of *amici curiæ* than of witnesses. Baldus, in his commentaries upon the Code, expounds the doctrines of the old civilians upon this subject by boldly asserting that "Medici propriè non sunt testes, *sed est magis judicium* quam *testimonium*." But this was in a day when juries were unknown, and the praetor could easily merge his opinion in that of the expert, thus, in fact, converting the witness into the court itself.[1] Such a substitution as this was never contemplated at common law, where the provinces of judge, juror, and witness are strictly prescribed and most jealously guarded, and where any encroachment on the part of either would invalidate the judgment, or at least render it amenable to revision. The testimony of an expert stands before such a court precisely as that of any other witness.

"The *opinion* of a witness," says Mr. Phillips,[2] in "general, is not evidence; the witness must speak to

[1] Cela tenait en grande partie à la séparation du *jus* et du *judicium* qui permettait dans la plupart des cas où des opérations de ce genre sont nécessaires, de réunir dans la meme personne les fonctions de juge et d'expert. Maynz, Elemens de Droit Romain, vol. 1, p. 348.

[2] Phillips on Evid. vol. 2, p. 899; 1 Grlf. Evid. § 440.

In general, the opinion of a witness is not evidence; he must depose to facts. But on questions of science or trade, or others of the same kind, persons of skill, may not only depose as to facts, but are allowed also to give their opinions in evidence. Tait's Evid. p. 433.

The general principle above enunciated that witnesses must state facts; not their opinions, or inferences, or conclusions, drawn from facts, is particularly set forth in the subjoined cases. Morehouse *v.* Matthews, 2 Comst. (N. Y.) 514; Dewitt *v.* Barley, 5 Seld. (N. Y.) 371; 3 Smith (N. Y.) 340; Maynard *v.* Beardsley, 7 Wend. 560; Mayor of N. Y. *v.* Pentz, 24 Wend. 668; Gibson *v.* Williams, 4 Wend, 320; Jefferson Ins. Co. *v.* Cotheal, 7 Wend. 72; Norman *v.* Wells, 17 Wend. 136; Lincoln *v.* Saratoga and Schenectady R. R. Co. 23 Wend. 425; Lamoure *v.* Caryl, 4 Denio, 370.

facts. But on questions of science or trade, or others of the same kind, persons of skill may speak not only as to facts, but they are allowed also to give their opinions in evidence. The opinion of medical men is evidence as to the state of a patient whom they have seen. Even in cases where they have not themselves seen the patient, but have heard the symptoms and particulars of his state, detailed by other witnesses at the trial, their opinion on the nature of such symptoms has been properly admitted." While thus departing from the strict principles of evidence based upon facts personally observed by the witness, the law confines such testimony strictly to such matters as pertain to science, and are not of general knowledge.[1] And any witness offered as an expert who can not establish the fact of special skill in the particular department which he is called upon to illuminate, will be rejected.[2] For it is a principle always to be regarded in such cases that general knowledge belongs to the character of an ordinary witness, and contrariwise, special knowledge is the distinguishing qualification of an expert. And the

[1] Gibson *v.* Williams, 4 Wend. 320; Morse *v.* State. 6 Conn. 9; Peterboro *v.* Jaffrey, 6 N. H. 462; Rochester *v.* Chester, 3 N. H. 349; People *v.* Bodine, 1 Denio, 281; Swan *v.* O'Fallon, 7 Miss. 231; Woodburn *v.* Farmers' and Mechanics' Bank, 5 Watts & Serg. 447; Rider *v.* Ocean Ins. Co. 20 Pick. 259; Harger *v.* Edmonds, 4 Barb. 256; Giles *v.* O'Toole, 4 Barb. 261; Robertson *v.* Stark, 15 N. H. 109; Concord R. R. *v.* Greeley, 3 Foster, (N. H.) 237; Woodin *v.* People, 1 Parker, Cr. R. 464; Cook *v.* State, 4 Zabrisk. 843; Patterson *v.* Colebrook, 9 Foster (N. H.) 94; Spear *v.* Richardson, 34 (N. H.) 428; Wagner *v.* Jacoby, 26 Miss. 530; Mobile Marine Dock and Mut. Ins. Co. *v.* McMillan, 31 Alab. 711.

[2] Boies *v.* McAllister, 3 Fairf. 308; Lester *v.* Pittsford, 7 Vermt. 161; U. S. *v.* Willard, Paine, 539; McLean *v.* State, 16 Alab. 672; Luning *v.* State, 1 Chand. (Wis.) 178; Daniels *v.* Mosher, 2 Mich. 183; Comm. *v.* Wilson, 1 Gray, 337; Dorsey *v.* Warfield, 7 Md. 65; Winans *v.* N. Y. & Erie R. R. Co. 21 Howard, U. S. 88; Winter *v.* Burt, 31 Alab. 33; Harris *v.* Panama R. R. Co. 3 Bosw. (N. Y.) 7; Sinclair *v.* Roush, 14 Ind. 450.

opinions of persons not being experts are inadmissible unless sustained by facts showing the opinion to be true.[1] A court also, before admitting an expert to testify, may hear evidence so as to satisfy itself that the witness offered really is what he assumes to be.[2]

§ 107. But in any event the opinion rendered by the witness should involve so much of *special* knowledge as to exclude it from the sphere of ordinary testimony, since, if it passes within it, the essential, pre-requisite element of skill is thereby destroyed, and the expert changes into an ordinary witness. And therefore, no party is entitled to ask the opinion of a professional witness upon any question except one of skill or science. Thus, in a prosecution for rape, it was held that a medical witness could not be asked whether, if the woman was a virgin, it was possible for the prisoner to have mastered her when one of his hands was behind her back, and the other on her mouth, the question not involving a point of medical opinion. Upon this principle all authorities are agreed, nor has it suffered any relaxation whenever an opportunity to assert it has been afforded.[3]

[1] Seibles *v.* Blackwell, 1 McMullan, 56.

[2] Mendum *v.* Comm. 6 Rand. 704; Tullis *v.* Kidd, 12 Alab. 648; Elfelt *v.* Smith, 1 Minn. 125.

[3] Henderson, 1836; 1 Swin. 316; Dickson's Evid. vol. 2, § 1996.

The opinion of a physician is not admissible upon a question respecting which unprofessional men can as well draw conclusions. Thus, where a body was found partially burned, and certain portions of it covered with loose clothing were not burned, the inference of a medical man that the person must have been dead before the fire broke out, as otherwise the covering would have been disturbed, was held inadmissible. People *v.* Bodine, 1 Denio, 281; Woodin *v.* People, Parker C. R. 464.

The opinion of a witness is not evidence for a jury, except where the question is one of science or skill, or has reference to some subject upon which the jury are supposed not to have the same degree of knowledge with the witness. Sowers *v.* Dukes, 8 Minn. 23.

It will be noticed in the above case that although the two characters of *ordinary* and of *skilled* witness could easily then, if ever, have been justifiably combined, the court did not overlook the necessity of keeping them conspicuously distinct. Any other ruling would have opened the door to confusion of testimony, by permitting either counsel to alter the character of the witness as might best suit the interests of his own case. Unless he were the only witness to a transaction requiring testimony both of an ordinary and a skilled character, it would have been manifestly improper to allow of his combining in his own person these two characters, and wherever there are intelligent ordinary witnesses to testify to matters of general knowledge, no reason can be conceived that would ever justify a court in departing from the rule above stated.[1] The more the ground of expert testimony can be narrowed and circumscribed, the easier it will be to obtain from its assistance intelligible and satisfactory results; while, on the other hand, the looser the system exhibited in introducing it before courts, and permitting

[1] The opinions of scientific witnesses have *per se* no special value when uttered in relation to subjects which lie within the range of common observation and experience. Brehm *v.* Great West. R. R. Co. 34 Barb. 256.

In a prosecution for rape, a witness, though a physician, can not be asked whether, from his knowledge of the strength and health of the prosecutrix, the defendant could have committed the offence without resorting to violence beyond the mere exercise of his physical powers. Nor can such a witness be asked whether, in his opinion, the crime of rape could be committed upon a woman of ordinary strength, who has borne children, without resort to extraordinary means. Such questions not involving, necessarily, professional skill, the jury can judge, as well as the witness, after they are in possession of the facts. Woodin *v.* People, 1 Park. C. R. 464; People *v.* Eastwood, 4 Kern. (N. Y.) 526, affirming 3 Park. Cr. R. 25.

A physician can not be asked his opinion as an expert as to whether a rape could have been committed in a particular way, if the question is not one which it requires professional knowledge to decide. Cook *v.* State, 4 Zabr. 843.

counsel to stretch it, *ad infinitum*, the more confusing and useless it becomes, even if, through astute perversion, it does not work harm to both causes of science and justice.

WHO ARE EXPERTS.

§ 108. The term expert, according to Bouvier,[1] is applied to all "persons who are instructed by experience." This restricts the definition to no particular class, but includes all who are specially instructed or experienced in any art or science. The occasional need of such a class of persons to act as witnesses intermediate to facts and the conclusions to be drawn from them, has always been recognized. In the Roman law, they are frequently alluded to, and in the earliest common law reports they are spoken of as of established usage. Says Saunders, J.: "And first I grant that if matters arise in our law which concern other sciences or faculties, we commonly apply for the aid of that science or faculty which it concerns."[2]

[1] Law Dictionary, in verb. Expert, 1 Grlf. Evid. § 440.

[2] Plowden, 125, M. 21, H. VII. placit. 30.

Hon. Emory Washburn, of the Dane Law School, in a paper on the *Testimony of Experts*, in the American Law Review for 1866, expresses himself as follows upon this subject. But in speaking of it as comparatively a *modern experiment*, he has evidently overlooked the *agrimensores* of the Roman law, who were well accredited *experts;* as also those titles in the Pandects, "*De inferendo Mortuo, De Inspiciendo Ventre, De Hermaphroditis, De Impotentia,* which plainly infer the necessity of medical experts to determine their legal application to particular individuals. Says this distinguished jurist:

"The whole system of experts, as now used, is comparatively a modern experiment. It has grown out of the wonderful growth and increase of science in modern days, and the development, by that means, of what was before too recondite to be any thing more than conjectural in the minds of even the wisest. The subject opens a new inquiry which affects the expert himself. Is he to be regarded as an ordinary witness, to be obliged to attend day after day in court at the beck of any party who chooses to

That this rule in the law of evidence was not alone recognized, but also frequently put into operation, is made manifest by a case in the Year Books, where, on an appeal of mayhem, the defendant prayed the court that the wound might be examined, on which *a writ was issued to the sheriff to cause to come "Medicos, chirurgicos de melioribus London, ad informandum Dominum Regem et Curiam de his quæ eis ex parte Domini Regis injungerentur."*[1]

It will be noticed here by the adjective *melioribus*, that the courts of that day took a higher view of the standard of qualification necessary to be reached by one offering himself as a medical expert, than many tribunals in modern times, and it is plain that the sheriff had to discriminate in

summon him, and to give upon oath for a dollar and a quarter a day, 'and four cents a mile travel, out and home,' what has cost him years of labor and research? If I am accidentally witness to a transaction, however unimportant such transaction may be to myself, or however inconvenient it may be to go to a distant part of the State to testify of it in court, I may be obliged to do so, since the general policy of the law requires the sacrifice of individual convenience to the means and necessity of carrying its provisions into effect. The fact of which I thus became cognizant was not a thing in which I can be said to have gained any exclusive property, by having bestowed my labor and time in its acquisition. But the skill and science which an expert is expected to employ implies expenditure of time, labor, and preparation, which are not to be measured by the ordinary price per day which is paid for the services of a day-laborer in sawing wood or carrying a hod. Nor do I understand that a party has a right to call upon a man of skill or science to exercise these in the trial of an ordinary question involving the right to property, or damages of a personal character, by simply summoning him, and tendering him the ordinary fees of a witness in court.

"If the case be one of a public nature, involving the question of a crime of magnitude, where the public safety requires the investigation, the right to compel the attendance of such witnesses becomes an incident to the exercise of government itself, in the same way that a juror is obliged to sacrifice convenience or profit to render a public service, or the soldier is called upon to take up arms in defence or execution of the law. It rests upon the maxim of *Salus populi suprema lex.*"

[1] Year Books, vol. 5, 28 Ass. placit. 5.

making his selection. And yet, overlooking entirely the definition of the term *expert*, it has been decided that one who is not engaged in the practice of physic may nevertheless be competent to testify, if he shows that he had studied the science of medicine and felt competent to express a medical opinion upon a particular disease, and the fact that he was not a practicing physician would go only to his credibility.[1] This decision was a most emphatic contradiction, in principle, of the very idea contemplated by skilled testimony, since it made any mere student of a profession the equal in law of the oldest practitioner in it. But in another case, before the same court, the limits of the assumed expert character of the physician were defined *quoad hoc;* there a witness in his deposition stated that he attended a certain negro "as a physician," and it was held that this was sufficient evidence that he was a physician to warrant the admission of his opinions in evidence *respecting the disease of the negro.*[2]

The fact, also, of an entirely new case in the experience of an expert, can not be said to invalidate his testimony, since, as may always be shown, no two cases are, in all particulars, precisely alike, and were perfect similarity necessary, before any expert could be allowed to express an opinion, no one would ever be found competent to act as such. But this would be stretching the rule into the domain of absurdity, and denying to the witness the right to reason from analogy, which, being nothing more than the law of resemblance, is, in truth, the very one constantly employed by the mind in drawing inferences from facts. It has been held, consequently, that opinions upon new and hitherto unknown cases were competent evidence, whenever the practitioners of the science swear they are

[1] Tullis *v.* Kidd, 12 Alab. 648. [2] Washington *v.* Cole, 6 Alab. 212.

able to pronounce them, in any particular case, although at the same time they should admit that precisely such a case had never before fallen under their observation, or under their notice, in the course of their reading.[1]

§ 109. It is extremely difficult at times, therefore, to determine who are, in point of competency, experts. As a general rule it may be said that *any* practicing physician is competent to express an opinion as an expert, on a medical question.[2] Nor is it even necessary that he should be a graduate of a medical college, or have a license from any medical board, in order to be a competent skilled witness.[3] This is in fact admitting *any one* to testify as a medical expert, who chooses to say that he is one, an enlargement of the character of such testimony which leaves it practically, without any limits. We can hardly believe that any future court would reaffirm so unwise a decision. The universal, and as must be admitted, the better doctrine is that, in order to render the opinion of a witness competent evidence, he must, in general, be in some way *peculiarly* qualified to speak on the subject, and have knowledge not possessed by the mass of persons of ordinary experience and intelligence.[4]

For, in matters of science, a person can not be considered as an expert, unless he has a particular knowledge of the science involved, and the opinions of professional men are evidence, as to matters which relate to their profession,

[1] State *v.* Clark, 12 Ired. 151; Parker *v.* Johnson, 25 Geo. 576; Page *v.* Parker, 40 N. H. 47.

[2] Livingston's case, 14 Gratt. 592.

[3] N. Orleans, &c. Co. *v.* Allbritton, 38 Miss. 242.

Except always where special statutes, as in Wisconsin (Laws of 1867, ch. 95, vid. *supra*), forbid such persons to be received as experts before Courts.

[4] Harris *v.* Panama R. R. Co., 3 Bosw. (N. Y.) 7.

and on such subjects only.[1] Still there neither is, nor can there ever be any definite rule as to the special artistic, or professional, or scientific experience required, in order to constitute an expert.[2] And assuming experience to form an essential and indispensable element of qualification in an expert, men equally intelligent may yet differ so widely in the single measure of their experience, as to impart undue weight to the testimony of an old practitioner simply because he is old. It does not follow, always, that age *increases* experience, however much it may multiply the opportunities for adding to it, and courts have felt it incumbent upon them to recognize this principle in the law of mental acquisition, and to discriminate in the case of experts between *general* and *special* experience.[3]

Hence a physician, although confessedly possessing the *ordinary* experience of his profession, may, *quoad* some particular problems in medical science not be an expert, in the best, and most critical sense of the term. And it is wrong to assume, in relation to any of the physical sciences, that, because a man has been a practitioner in it, he is equally competent and skillful in *all* its departments. *Non omnes omnia possumus* must ever be borne in mind, and most generally, to attain eminence in any science, is to limit oneself to some one particular branch

[1] Allen *v.* Hunter, 6 McLean, 303; Fairchild *v.* Bascom, 35 Verm. 398; Brooks *v.* Jenkins, 3 McLean, 432.

[2] Sowers *v.* Dukes, 8 Minn. 23.

[3] Upon questions of skill or science, men who have made the subject matter of inquiry, the object of their particular attention or study, may give their opinions in evidence; it being first shown that they are skillful or scientific, or at least, that they have superior actual skill, or scientific knowledge. Mere opportunity for observation is not sufficient. Page *v.* Parker, 40 N. H. 47.

of it. Medicine is no exception to this rule, and it has been held, in recognition of this great principle of limited attainments on the part of its practitioners, that a physician who has been in practice for several years, but who has had no experience, as to the effects of illuminating gas upon the health, when breathed, can not be allowed to testify in relation thereto, as an expert. And experience in attending upon other persons, who, it is alleged, were made sick by breathing gas from the same leak is insufficient for this purpose.[1]

In any event, the law may be considered as simply requiring that the party offered as an expert shall, in the whole view of the case, present evidence of having had the best opportunities for perfecting his knowledge in that particular subject on which his opinion is desired. Beyond this, and as between varying degrees of competency among experts, no other test of qualification can be applied, for no other is, in fact, possible; and since errors in judgment may occur here, as well as in any other department of human investigation, there is no means of knowing absolutely whether the witness is qualified to deal, or not, with all the problems which the complexities of any given case may present to him. Once received as an expert, the maxim *cuilibet in sua arte perito credendum est*, must be applied, nor can the conclusions of such a witness be contradicted by any unskilled person. What constitutes an expert, therefore, is a matter depending exclusively upon *special* and not upon *general* experience. Yet in correlated departments of science, as in medicine, for example, the special skill of the expert may so overlap a co-ordinate branch, as to authorize him to speak *ex cathedra* upon it.

[1] Emerson *v.* Lowell Gas Light Co., 6 Allen, 146.

§ 110. The following cases will illustrate this principle in a striking manner. A witness in her deposition asserted, that her experience in the particular avocation of a midwife, enabled her to judge of the existence of a certain class of diseases in females. The opposite party omitted to test her knowledge or experience by a cross-examination, and an objection being taken, on an appeal from the court below, to the admission of her testimony, it was held that such evidence was competent, because relating to particular matters which came by implication within the purview of her general qualifications. For, said Goldthwaite, J.:[1] "It would be going very far to exclude testimony on the ground that a particular fact was not proved, when the examination itself was of a general matter which pre-supposed the information or skill to speak of it."

Again, and as further elucidating this doctrine: "On the trial of an indictment for murder by poisoning, after an opinion, adverse to the theory of the prosecution, had been testified to by a physician, with reference to the appearances on a *post mortem* examination, and the time indicated by them when the poison was introduced into the stomach, an experienced chemist, who had made the *post mortem* examination was asked by the prosecution, the following question: 'In your opinion, can a physician, from a mere *post mortem* examination of the exterior surface, and the indications of inflammation which he discovers, determine, with any degree of certainty the precise period of time when such inflammation was caused?' and the question was objected to on the part of the prisoner, as being 'immaterial, improper and incompetent.'"

[1] Milton *v.* Rowland, 11 Alab. 732.

It was held—

That the question was competent.

That the objection raised no question as to the *form* of the interrogatory, but merely as to the substance.

And that the ground of the objection, as stated, presented no question whether an opinion was competent on the subject, nor whether the witness was one of the class of persons who were qualified to express an opinion, because such grounds of objection were not specifically stated.

Also, held, that the subject-matter of the question was one upon which a professional man or an expert might rightfully be called upon to express an opinion. And that a chemist would be quite as competent to answer the question as a physician.[1] (Justice Wright, dissenting.)

OPPOSITE SYSTEMS OF MEDICINE.

§ 111. The vexed question of who shall decide where doctors disagree, a contingency which must inevitably happen, wherever practitioners of different systems of therapeutics are called upon to express opinions based upon fundamental propositions in their medical creeds, this problem, is not one upon which courts can pass judgment, by excluding any particular sect of physicians from the right of testifying as experts. As a general proposition, any physician may be an expert in matters pertaining to medical science, although in fact many will fail to satisfy a court that they are so, in relation to some *special* department of experience, in which they have not either had opportunities, or availed themselves of them if pos-

[1] Hartung *v.* The People, 4 Park. Cr. R. 319.

sessed, to become eminently skillful. Insanity and analytical chemistry will readily occur to all as very significant illustrations. But when it comes to differing systems of medicine as affecting competency to testify, the same rule which courts have, in the absence of statutory restrictions, felt compelled to adopt in regarding any person a physician who publicly announces himself to be such, and undertakes to perform cures as a profession, has, by parity of reason enforced upon them the duty of admitting any such person to testify as an expert, who can show himself to be one, irrespective of the doctrines he may believe in, or promulgate, or any school or sect to which he may belong. In this respect medicine is put upon a similar footing with religion. And courts will receive the opinions of physicians of any school as equally entitled to respect, leaving their credibility and authority to be determined by the jury. The rule that *cuilibet in sua arte perito credendum est*, restricts them from assuming the prerogative of deciding upon the merits of conflicting systems of medical practice. No special right of selection belongs to them *ex-officio*, and it is, therefore, most proper that judges should take refuge in official neutrality, leaving the weight of medical testimony to decide by its authority, rather than its numbers, the vexed question at issue.

§ 112. It is also a fact not to be lost sight of, that a court may not be any more competent to decide that a medical witness offered is not an expert, than that he is, for its qualifications in this particular are no better than those of ordinary laymen; but, in this aspect of the subject, the same objection might be raised against its decisions in behalf of any class of experts. The question turns upon its right to prejudge against him, on an as-

sumption of incompetency founded upon erroneous opinions in medical philosophy, and since it can not act inquisitorially in matters about which it admits ignorance, through its very invocation of his assistance, it follows that it can not logically exclude him, unless he himself confesses ignorance or inexperience in that special department of inquiry which he is called upon to illuminate. In default of such admission, the testimony of any physician is equally competent, whatever be the name, or style under which he practices his art. And in a recent case in Iowa, in which this vexed question of differing schools of medicine came up, the Court said: "Though the regular system has been advancing as a science for centuries, aided by research and experience, by wisdom and skill, still the law regards it with no partiality, or distinguishing favor; nor is it recognized as the exclusive standard or test by which the other systems are to be adjudged. The evidence of the experienced practitioner of either system, is equally admissible in giving opinions upon questions of medical skill.[1]

COMPENSATION OF EXPERTS.

§ 113. The administration of justice being a source of mutual benefit to all the members of a community, each is under obligation to aid in furthering it as a matter of public duty. As an *ordinary* witness or a juror, every competent citizen may be summoned by due process of law to appear, and render personal service in court, without right on his part to a special compensation for so doing. His time is, *quoad hoc*, claimed by the public as

[1] Per Greene J., in Bowman *v.* Woods, 1 Iowa, 441.

a tax paid by him to that system of laws which protects his rights as well as those of others. A subpœna duly served is therefore a peremptory command from the sovereign authority to attend before some court, nor can any one disobey it with impunity. This is the rule in relation to *ordinary* witnesses, wherever the common law is a recognized part of the established jurisprudence of a country. But inasmuch as an expert is not an ordinary witness, the inquiry naturally arises whether he stands upon a similar footing of obligation to the public, merely from the fact of citizenship?

It has been questioned by some whether an expert, informed of the special purpose for which he was summoned before a court, was bound to regard its subpœna until a compensation was first tendered to him.[1] The question ignores at the outset the fact, that the subpœna is a

[1] In Betts *v.* Clifford, *Warwick Lent Assizes*, 1858, (referred to in Taylor's Medical Jurisprudence, Penrose's Ed., Philadelphia, 1866, p. 38), Lord Campbell is reported to have said that "a scientific witness was not bound to attend, upon being served with a subpœna, and that he ought not to be subpœnaed. If the witness knew any question of fact he might be compelled to attend, but he could not be compelled to give his attendance to speak to matters of opinion." This is very strong language to say the least, particularly in its present unqualified form, and involves so many contradictions of well established rules of practice that we can give but little credence to the report as it now stands. For, in the first place it has never been admitted to be within the discretion of any person to disobey the subpœna of a court within whose jurisdiction he may chance to be. The *vis major* is the only excuse he can plead in extenuation of his non-attendance. In the second place, even if told the purpose of his examination, he can exercise no choice in the matter of his attendance, unless he could show that he was neither a competent ordinary witness, nor an expert; but as he can never know this absolutely in advance, it is certainly made his duty to obey the subpœna. Since, by disregarding the summons he places himself in contempt of court, and would have to answer in person for this, either by fine or otherwise, as might be adjudged. We are inclined, therefore, to regard the above alleged dictum of Lord Campbell as a misapprehension, on the part of the reporter, of what his lordship did say.

peremptory command, not to be construed by the expert or any one else according to any hypothesis of their own. It is an order for a personal attendance at court, and *must* be obeyed, if within the range of physical possibility. And as it does not recite the special character in which the witness is called to appear, it is not for him, even upon information received from litigants, to demur attending until first rewarded. His simple duty is to attend.

§ 114. But once put upon the stand as a *skilled* witness, his obligation to the public now ceases, and he stands in the position of any professional man consulted in relation to a subject upon which his opinion is sought. It is evident that the skill and professional experience of a man are so far his individual capital and property, that he can not be compelled to bestow it gratuitously upon any party. Neither the public, any more than a private person, have a right to extort services from him in the line of his profession, without adequate compensation. On the witness' stand, precisely as in his office, his opinions may be given or withheld at pleasure, for a skilled witness can not be compelled to give an opinion, nor committed for contempt if he refuses to do so. Whoever calls for an opinion from him *in chief*, is under obligation to remunerate him, since he has to that extent employed him professionally; and the expert at the outset may decline giving his opinion until the party calling him either pays, or agrees to pay him for it. When, however, he has given his opinion he has now placed it among the *res gestas* of the evidence, and can not decline repeating or explaining it on cross-examination. Once uttered to the public ear of the court, it passes among the facts in evidence, and counsel may use it as they please, without any further compensation to him. The point of declining to

give it gratuitously must be made, if at all, at the opening of his examination *in chief*, and will avail him nothing if delayed until the cross-examination. He has been called to be consulted in open court by somebody, and from that party alone has he a right to claim a compensation for his services.

§ 115. As the result of the foregoing conclusions it may be said, that a witness who is called in an action to depose to a matter of opinion, depending on his skill in a particular trade, has, before he is examined, a right to demand, from the party calling him, a compensation for his services; for there is a wide distinction between a witness thus called, and a witness who is called to depose to facts which he saw. In this connection Maule, J., said: "There is a distinction between the case of a man who sees a fact and is called to prove it in a court of justice, and that of a man who is selected by a party to give his opinion, on a matter with which he is peculiarly conversant from the nature of his employment in life. The former is bound, as a matter of public duty, to speak to a fact which happens to have fallen within his knowledge—without such testimony the course of justice must be stopped. The latter is under no such obligation. There is no such necessity for his evidence, and the party who selects him must pay him."[1]

§ 116. This same rule will, by parity of reason, apply to *personal services* demanded from the expert, as well as to opinions. Thus in cases where coroners summon medical witnesses, who may literally know nothing of the cause of death of the party, to give an opinion, which they can not pronounce before making an examination of

[1] Webb *v.* Page, 1 Carr. & Kir. 23; 1 Grlf. Evid. § 310, n.; Willis *v.* Peckham, 1 Brod. Bingh. 515.

the corpse, it is not obligatory upon them to make such examination until they have been paid for the same, or a promise to that effect been received. They may even decline undertaking it altogether, as they would any other professional service. So, too, with analyses required from chemists. Although they can not always be paid in advance, from the impossibility of knowing beforehand what they will cost the experts in disbursements, still, he has a right to demand a legal promise from the party requiring the service, whether that party be a public officer or a private citizen. It has been held, it is true, that "a physician is not entitled to any greater compensation for traveling to and giving evidence at a coroner's inquest, in obedience to a subpœna, than any other witness;"[1] but it is plain that the proposition is a correct one only so far as it relates to traveling expenses, and not beyond, unless he appears as an *ordinary* witness. No man is obliged to render professional services gratuitously to any person, public or private. And even in the decision above quoted, the principle was directly enunciated that "the expenditure of labor and skill by the physician in a post mortem examination will entitle him to additional compensation," thus fully endorsing the principles hereinbefore stated, except as to his right to demand them in advance, and that right we believe to be no longer questionable.

[1] Gaston *v.* Comms. of Marion Co. 3 Ind. 497.

CHAPTER II.

CHARACTER AND SCOPE OF SKILLED TESTIMONY.—CONFESSIONS.—PROFESSIONAL BOOKS.—MEMORANDA.

§ 117. The fact that physicians are, inferentially, experts in matters relating to disease, does not exclude any ordinary witness from testifying to its existence, so far as to speak of the general health of a party; for any one may speak of disease in another whenever it becomes patent to observation.[1] But only physicians can testify as to the *nature* or *cause* of a disease.[2] Thus, an experienced physician, after having made a post mortem examination of the body of a female, was allowed, as an expert, to give his opinion as to whether she had been pregnant, and what was the cause of her death.[3] But a general limitation is always put to the subject matter upon which an expert is entitled to express an opinion, so as to narrow that opinion down to the facts stated, and to them alone, and he can not, therefore, give his opinion upon the opinions previously given by other experts, since that would be deciding upon the merits of others' testimony.[4] Thus a consulting physician will not be permitted to state in evidence his opinion, when that opinion

[1] Brown *v.* Lester, Geo. Decis. Part 1, 77; Milton *v.* Rowland, 11 Alab. 732; Wilkinson *v.* Mosely, 30 Alab. 562; Barker *v.* Coleman, 35 Alab. 221; Blackman *v.* Johnson, Ibid. 252; *Vide* Bell *v.* Morrisett, 6 Jones' Law (N. C.) 178, where this doctrine is combated.

[2] Lush *v.* McDaniel, 13 Ired. 485; McLean *v.* State, 16 Alab. 672.

[3] State *v.* Smith, 32 Maine, 369.

[4] Walker *v.* Fields, 28 Geo. 237.

is predicated mainly upon statements of facts made to him by the attending physician, out of the patient's presence, for the purpose of a professional examination of the patient. But if the attending physician is himself a witness, or if the facts are testified to by others, the opinion of the consulting physician upon the hypothesis of the existence of such facts in addition to those within his own observation, is admissible.[1] In a criminal trial, the opinion of one expert as to whether a certain state of facts was enough to justify another expert in the formation of an opinion to which the other had testified, was held to be inadmissible.[2]

And, after a witness has been admitted to testify as an expert, evidence can not be given to the jury of the opinions of other experts in the same science, as to whether the witness was qualified to draw correct conclusions in the science on which he had been examined, though such testimony might have been properly offered to the court to show the competency of the witness before he was admitted to testify.[3] The rule imposing limitations upon such opinions, is now well established, and the expert's own character is best protected by it, under the maxim of *experto crede*, since, whatever might be said by one expert in derogation of another's opinion, might in turn be said of his own; *mutato nomine de te fabula narratur*. As might be inferred from this, experts are never permitted to state their views on matters of legal or moral

[1] Whetherbee's Exrs. *v.* Wetherbee's Heirs, 38 Verm. 454.

But the interrogatories to such medical persons must be so framed as not to elicit, and their answers so given as not to contain, any expression of opinion by them on the *credit* of the witnesses or truth of the facts testified to by others. Livingston's case, 14 Gratt. 592.

[2] People *v.* Hartung, 17 Howard Pr. R. 151.

[3] Tullis *v.* Kidd, 12 Alab. 648.

obligation, nor on the manner in which other persons would probably be influenced, if parties acted in some particular way. And on similar principles the opinions of medical practitioners upon the question whether a certain physician had honorably and faithfully discharged his duty to his brethren have been rejected.[1]

The reason of these adjudications is founded in the principle that experts have no proper concern with the *merits* of a controversy, and no right consequently to express any opinions upon a purely ethical proposition. In delivering such extra professional opinions, they clearly transcend the sphere of their medico-legal duties, and usurp the province of both court and jury. It is for these reasons that they are not allowed to sit in judgment upon the moral conduct of others, or to express their views upon matters not directly germane to their duties as skilled witnesses.

§ 118. Dealing exclusively with facts, and not with opinions, it is made the duty of the expert to endeavor to enlighten the court by stating the data upon which his conclusions are founded. There must be some evidence, even though not completely comprehensible to others, why he has arrived at some particular opinion rather than at any other. Because, if any other opinion were possible, the party to whose advantage it might enure has the right to insist that it shall not be withheld. It is, therefore, the entire evidence adduced in support of the controverted issue which forms the essential foundation upon which an expert can alone base his opinion, since this latter is to be weighed in relation to its correspondence with the facts thus elicited, not being in itself conclusive as to them,

[1] Campbell *v.* Rickards, 5 B. & Adolph. 840; Ramadge *v.* Ryan, 9 Bingh. 333.

and in a late case in Vermont where this point was mooted, the court said that, "The opinion of experts was evidence to be considered by them in connection with the other evidence bearing on the subject, but was not of itself conclusive; that the value of the rule of law, permitting them to testify their opinion, was grounded on the fact that generally such opinion was correct; that the value of such opinion was to be determined by the jury, having reference to the skill and competency which the witness manifested, in connection with the other evidence which was before them to be considered in determining whether the disputed letters were in the plaintiff's handwriting; that experts were not infallible; generally their opinion was reliable, but they sometimes were wrong."[1]

"In evidence of opinion," says Mr. Dickson,[2] "it is essential to ascertain precisely the data on which the witnesses proceed. For example, a physician often forms his opinion as to a supposed disease, partly from the symptoms which he observed himself, and partly from statements by the patient as to his sufferings, and statements by another medical attendant or a sick-nurse. He may also have proceeded upon examination of evacuations or blood, which he was informed came from the patient. Nearly all his data will thus have come to him at second hand, and may have been fabricated or erroneous. He ought therefore to be examined with reference to different combinations of these supposed facts, corresponding to the different results at which the jury may arrive regarding their authenticity. In like manner, a written medical report ought to bear on its face the data on which the opinions contained in it proceed. Its proper purpose is to set forth the inference deducible by a medical man

[1] Pratt *v.* Rawson, 40 Verm. 183. [2] Dickson's Evid. vol. 2, § 1998.

from facts observed by himself. But if any information which he has derived from other sources would, if true, modify his opinion, he should state the results at which he would arrive, on the hypothesis of the information being wholly or partially correct."

§ 119. These fundamental principles governing the testimony of skilled witnesses have been frequently affirmed in various ways by American courts. At the outset of any such evidence, and even though unsolicited, an expert *may* give the grounds and reasons of his opinion in his examination in chief, as well as the opinion itself.[1] And it is in fact so far made his duty to do so by the very nature of the testimony itself, that it has been held that a physician *should* state the reasons of his opinion and the facts on which it is based, and if not sustained by them, it is entitled to little weight.[2] *Testes rationem scientiæ reddere teneantur.*[3] But in order to make the opinions of experts admissible, they must be founded on a given state of facts, which should embrace all the facts relied upon to establish the theory claimed.[4] Wherever these facts are controverted, they can not be properly considered as affording the witness any opportunity of forming a conclusive opinion; for, as in the case of any other syllogism, if the premises are not admitted the conclusion can not be drawn absolutely. Hence experts are not allowed to give their opinions upon the case where

[1] Keith *v.* Lothrop, 10 Cush. 453.

[2] Clark *v.* State, 12 Ohio, 483.

Medical testimony, as to the injuries likely to be produced under a given state of facts, is properly admitted, where the witness states the precise facts on which he bases his opinion, and the court does not withdraw from the jury, the right or liberty to consider whether these facts are established by the testimony. Wendell *v.* Troy, 39 Barb. 329.

[3] Heineccius ad Pand. pars. IV. § 144.

[4] Lake *v.* People, 1 Parker (N. Y.) 495.

its facts are controverted, though counsel may put to them a state of facts and ask their opinions thereon.[1]

It is only by a comparison of all the facts in issue that the expert can venture to express any opinion upon them; whence it follows, as a necessary consequence, that expert opinions are admissible if based upon a state of facts which the evidence on behalf of either party tends to establish. But the jury should know upon what facts the opinion is founded, for its pertinence depends upon whether the jury find the facts on which it rests.[2]

On the trial of an indictment for selling diseased meat, physicians were allowed to give their opinions as to the nature of the disease of which the animal died, founded on the descriptions which other witnesses had given of its ulcerated condition, and also as to the consequent unwholesomeness of the meat.[3] Yet a physician was not allowed to express his opinion whether, from the condition of a slave, as described by two witnesses named, whose testimony was conflicting, "the attention of a physician was necessary."[4] Had there been no conflict in the testimony, so as to present an admitted state of facts, even though the facts themselves were of variable interpretation, his testimony would have been valid.

Again, on a trial for an assault with intent to kill, a surgeon was asked as an expert, whether a certain wound given on the chest endangered life, and the question was held to be a proper one.[5] In answering such an inquiry, it is evident that most of it must be speculation upon con-

[1] U. S. *v.* McGlue, 1 Curtis C. C. 1.

[2] Whetherbee's Exrs. *v.* Whetherbee's Heirs, 38 Verm. 454.

[3] Goodrich *v.* People, 3 Parker (N. Y.) 622.

[4] Wilkinson *v.* Mosely, 30 Alab. 562.

[5] Rumsey *v.* People, 10 N. Y. 41; Anthony *v.* Smith, 4 Bosw. (N. Y.) 503.

tingencies more or less remote. A trivial cause has been known to destroy life in one man, and a great one to fail doing so in another, and since what has once happened may happen again, it is only an inference from a general proposition that the majority of men do succumb under a particular class of injuries, that justifies our announcing what the possibilities are in any given individual. The probabilities are even more conjectural, in all attempts at foreseeing the consequences of natural causes, when they pass beyond that first class, so patent in character as to amount almost to certainty. And it is in this view of the shifting processes of nature that the *conjectures* of medical men as to the probable duration of a disease have not *per se* the weight of proof of the fact of duration.[1]

This point was well sustained in a rehibitory action where, there happening to be a conflict of opinion between two physicians testifying to the nature of the disease of which a slave died, the court held that more weight was due to the opinion of the attending physician who made the *post mortem* examination, than to one who had only casually seen him; for, said Judge Martin,[2] "From the extent of the internal ravages of the disease, he was better enabled to form an opinion of its duration and real character than the other physician, who, although he had seen and attended the boy shortly before the sale, could speak only from conjecture as to what happened afterwards, in relation to the disease of which the negro died, and the state in which his body was found."

§ 120. Inasmuch as serious internal lesions may exist without giving adequate external signs of their presence, and the *grouping* of symptoms may alone furnish to the

[1] Cahn *v.* Costa, 15 La. Ann. 612; Paty *v.* Martin, Ibid. 620.

[2] Forsyth *v.* Despierris, 15 La. 215.

expert indicia of morbid conditions, the rule of requiring specific data on which to found conclusions, has necessitated relaxation in this particular, so as to enable the expert to speak of matters of inference, not absolutely demonstrable. Under such circumstances a medical expert testifying to the character of a personal injury, may be asked on cross-examination, if it is not a fact in his experience that injuries may, and do exist, where there are no outward manifestations of them.[1] And, in the same case, the surgeon who attended and prescribed for the plaintiff once, three months after the accident, and examined the injuries again after the action was brought, was allowed to testify to his opinion of the plaintiff's condition, *and the lasting character of the injuries*, derived from what he saw, but not from any statement of the plaintiff, and to testify also, that, at the last interview she went lame, although he did not remember the particulars of the injury, or of the treatment which he prescribed at his first visit.[2]

It is a proper question to ask, and experts are allowed therefore to express their opinions touching the permanency of any injury which forms the basis of an action to recover damages.[3] In such cases, as in all those where testimony is required to explain the extent of personal injuries, likely to be produced under a given state of facts, the opinions of experts are admissible, provided the witness states the precise facts upon which he bases his opinion, and the court does not withdraw from the jury the right or liberty to consider whether these facts were established by the testimony.[4] But

[1] Rowell *v.* Lowell, 11 Gray, 420.

[2] Ibid.

[3] Newell *v.* Doty, 33 N. Y. 83–94.

[4] Wendell *v.* Mayor of Troy, 39 Barb. 329; Goodrich *v.* People, 3 Parker, 622; People *v.* Lake, 2 Kern. (N. Y.) 358.

it is always necessary to avoid propounding such questions as seem to involve the very point at issue, since the expert will not be allowed to answer them, and the proper course is, to ask his opinion upon a supposititious statement, illustrative of the case on trial.[1]

CONFESSIONS OF PATIENTS.

§ 121. The relations of the patient to the physician being necessarily of a confidential character, communications are often made to him in the nature of confessions. These communications, which may relate either to the history of a transaction in which a wound has been received or a particular disease communicated, whenever essential to the treatment of the patient's case, are in some States considered privileged communications, which the physician is either expressly forbidden, or not obliged to reveal. This is the law in Arkansas, California, Indiana, Michigan, Iowa, Missouri, Minnesota, New York and Wisconsin.[2] The confession in order to be protected against disclosure, must relate exclusively to such matters as are indispensable to the professional treatment of the patient. Communications made outside of this sphere, acquire no immunity from having been entrusted to physicians, for at common law such are not deemed privileged, and wherever so recognized they are the creatures of statutory enactment.[3]

[1] Perkins *v.* Concord R. R. 44 N. H. 223.

[2] Arkansas, Dig. of Statutes, 1858, ch. 181, § 22; California, 1850–1864, § 5336; Indiana, Acts, 1861, p. 51, § 3; Michigan, R. S. 1846, chap. 102, § 86; Minnesota, St. 1849–58, p. 682; Missouri, R. S. 1845, chap. 186, § 20; Wisconsin, St. 1858, p. 812; Iowa, Rev. Stat. 1860, § 3985; New York, Rev. Stat. 5th Ed. Vol. 3, p. 690; Vid. Johnson *v.* Johnson, 4 Paige, Ch. R. 460, and 14 Wend. 637.

[3] 1 Grlf. on Evid. § 248.

Yet, in some of the above mentioned states the party interested may waive the privilege, in which case the communication may be disclosed.[1] But in New York it is expressly enacted that "no person duly authorized to practice physic or surgery *shall be allowed to disclose* any information which he may have acquired in attending any patient in a professional character, and which information was necessary to enable him to prescribe for such patient as a physician, or to do any act for him as a surgeon."[2] Necessarily all communications, and however privileged, must be of a lawful character, and not against morality or public policy, hence, a consultation as to the means of procuring an abortion in another is not privileged; nor by parity of reason would any similar conference which was held for the purpose of devising a crime, or evading its consequences.[3]

PROFESSIONAL BOOKS.

§ 122. The object of calling an expert into court being to obtain a personal opinion from him, together with the reasons therefor, it has become a rule of very general adoption, both in this country and Great Britain, not to admit professional books in evidence, nor even to allow the expert to quote their opinions by substitution for his own.[4] Yet he may be asked the ground of his judgment

[1] On a motion for a new trial, supported by the affidavit of a physician that a party had confessed to having allowed an abortion to be committed upon herself, it was held that such proof was inadmissible, without first showing permission on the part of the female to the physician to reveal the same. Harris *v.* Rupel, 14 Ind. 209.

[2] R. S. *ut supra.*

[3] Hewitt *v.* Prime, 21 Wend. 79.

[4] 1 Grlf. Evid. § 440, n.; Comm. *v.* Wilson, 1 Gray, 337; Washburn *v.*

and opinion, which might in some degree be founded on these books, for it could be easily shown in any case that no man had ever framed an opinion without elementary assistance from some objective source, and as books are the chief instructors of educated men, while experience is only the practical application of their teachings to the necessities of professional life, it follows that some book-knowledge is, in fact, at the bottom of all opinions. The expert of course may consult them as much as he pleases before going into court, and may even refer to them as representing the accepted opinions of the profession, but he can not read from them.[1]

The reason of this rule is founded in the principle, that the expert is called to express a personal opinion upon a state of facts of variable interpretation, and if a book could pronounce it as well, it would be superfluous to call him. He is summoned for the purpose of giving aid, through the employment of his professional experience, to the admin-

Cuddihy, 8 Gray, 430; Melvin *v.* Easley, 1 Jones' Law (N. C.) 386; Collier *v.* Simpson, 5 C. & P. 74; Darby *v.* Ouseley, 1 H. & N. 1; 2 Jur. N. S. 497.

Per contra. Standard medical books are admissible as evidence of the author's opinion upon questions of medical skill and practice involved in the trial of a cause. Bowman *v.* Woods, 1 Iowa, 441.

[1] "It would seem that in all cases where skilled witnesses are called to pronounce their opinions on some scientific question, they may refresh their memory by referring to professional treatises. For instance, though medical books are not directly admissible in evidence, there appears to be no good reason why a physician should not be allowed to strengthen his recollection by referring to such as he considers to be works of authority, or why he should not be asked, after such a reference, whether his judgment was or not thereby confirmed. We are not aware, however, that this course has ever been directly sanctioned; though a medical witness has been asked whether, in the course of his reading, he has not found a certain mode of treatment prescribed; and he has also been permitted, while explaining the grounds of his opinion, to state that his judgment was founded in part on the writings of his professional brethren." Taylor's Evid. vol. 2, p. 946.

istration of justice, and when he undertakes to read from books a conclusion which he claims to adopt as his judgment in the premises, he certainly does, to that extent, attempt to substitute another's opinion for his own. This, of course, is a perversion of his function as an expert, thereby changing it into that of a retailer of other men's ideas.

§ 123. Yet he may, after stating his opinion, give the reasons for it, as founded upon the concurrent observation and experience of others recorded in their works, and thus contributing to furnish him with that general knowledge, by means of which he is confirmed in his competency to act as a skilled witness. Accordingly, it has been held that medical witnesses, in giving their opinions as experts, are not confined to the results of their own observation and experience, but may give opinions based upon information derived from books.[1] But the naked statements of books of science not verified by his own experience, is of no more authority than the books themselves, and the opinions given in such books are not legal evidence.[2]

The justice of excluding scientific books from the field of evidence becomes immediately apparent, when we reflect that they deal necessarily only with universal propositions, and inasmuch as every particular case wears a complexion of its own, it is indispensable to its correct interpretation that some living witness, skilled in experience, and able to detect laws of common agreement, should be called in as an expert umpire. As no dictionary of human thoughts will ever be written, so no dictionary of

[1] State *v.* Terrell, 12 Rich. Law (S. C.) 321.

Semble that they may sometimes be read, not as evidence *per se*, but as part and parcel of the expert's testimony. Sussex Peerage case, 11 Cl. & Finn. 114; Lord Nelson *v.* Lord Bridport, 8 Beav. 527.

[2] Luning *v.* State, 1 Chandler (Wis.) 264.

physical laws will ever be compiled, that shall provide with strictest fidelity, the necessary interpretation for all the variously complex and conflicting manifestations of mutational phenomena, not to speak of the more puzzling sphere of antinomies and apparent contradictions.

MEMORANDA.

§ 124. The fleeting character of mental impressions, and the uncertainty of memory in moments of supreme want, has created the necessity of records or memoranda, for the purpose of verifying facts not otherwise to be proved. "The images painted in our minds," says Locke, "are laid in fading colors, which, if not often renewed, soon vanish and disappear." This law of our mental constitution, recognized by courts, has led them to regard documentary evidence as entitled to great importance whenever its character is duly authenticated. In like manner, memoranda, although not legal instruments in the proper sense of the term, have been considered as an inferior class of records, and as such entitled to some standing in courts. Such minutes of past facts may be used by experts while under examination, but only to refresh their memory, and not to take its place. For this purpose they may use written entries in note-books, or even copies of them, provided always they can swear to the truth of the facts as there stated. Yet, if they can not, from recollection, speak to the fact any farther than as finding it stated in a written entry, their testimony will amount to nothing.[1] It is not necessary that the writing should have been made by the expert himself,

[1] Phillips on Evid. Am. ed. p. 290, n. 528.

nor even that it should be an original writing, provided, after inspecting it, he can testify to the facts from his own recollection.[1]

It may often happen, indeed, that in performing an autopsy, a surgical operation, or a toxicological investigation, a physician will deputize another, or a student, to take notes under his dictation. These notes, it is plain, can not be in his own handwriting, and circumstances may further require that they should be copied before being brought into court, so that in fact they are no longer an original writing. Still, if they serve to recall to the memory of the expert the facts which they describe, and he can speak of them *knowingly*, and not simply because he finds them there, his testimony will be valid. The memorandum, therefore, must never be a substitute for the memory, but only an aid to it. And, where the witness neither recollects the fact nor remembers to have recognized the written statements as true, and the writing was not made by him, his testimony, so far as it is founded upon the written paper, is but hearsay. For the memorandum is never received as *independent* evidence, but only as a remembrancer, and collateral proof of the witnesses memory.[2]

As to the time when a writing or memorandum should have been made, no precise rule is established. It should certainly have been made within such a lapse of time since the transaction occurred, as to raise no suspicion that the memory of the witness might have become weakened, in relation to the details of the event recorded by him. It is to the circumstances in each particular case that we must look for the best criterion in determining such in-

[1] Grlf. on Evid. § 436.

[2] Lapham *v.* Kelly, 35 Vermont, 195.

quiries.[1] But, in order to afford as little reason as possible for questioning the validity of such memoranda, it is important that their date be as contiguous to that of the transaction as may be. Every day diminishes the value of their precision, and casts doubts upon their fidelity.

[1] 1 Grlf. Evid. § 438; 1 Stark. Evid. 154–5.

CHAPTER III.

EVIDENCE IN CASES OF ALLEGED INSANITY.—MEDICO-LEGAL CONFLICTS.

§ 125. Perhaps the most trying position in which a physician ever finds himself placed before courts is in cases of alleged insanity. While all departments of physical investigation may be considered difficult to explore in their fundamental propositions, particularly when these latter are masked beneath the ambiguities of individual manifestations, that of mental disorder affords the widest field for controversial discussions, and the employment of dialectic ingenuity. Here, the incessant blending of Metaphysics with Physiology opens the door to a world of conjecture, hypotheses and loose inferences, mingling with scientific analysis, and positive clinical knowledge. Law, Theology and Medicine are either at times pitted against each other, or not infrequently confronted by ancient superstitions, crude popular conceits and inherited prejudices.

Every man, learned or illiterate, entertains his own views of insanity. To some it is still a sacred disease, an evidence of demoniacal possession; to others but an organic disturbance reflecting itself upon the mental principle. While the world of philosophers, as soon as it investigates this disease in its influences upon moral responsibility, and legal accountability, inevitably divides itself into those who syncopate disease from depravity, looking upon each as a separate, distinct entity, and

those who confound them as necessarily correlated in nature, being analogous states with varying degrees of intensity. Among philosophers we shall accordingly find the *eidola tribus* or *specus*, among laymen the *eidola fori*. Among the former, like the mediæval battles between Nominalists and Realists, the contest will be hotly waged between the *somatic* and the *psychological* schools, thus affording to either party, on the trial, the opportunity of calling to his aid whichever school of experts will best support his own allegations. And, between the two classes of medical disputants, the jury will oftener remain confused than enlightened, since, by unnecessary quibbling over types of insanity it may finally be deduced that all men either are, or have been tinctured with it in some form—(*semel insanavimus omnes*)—from the prisoner at the bar, to the judge and jury who try him, and accordingly, by carrying this argument to its necessary conclusion, we should reach the *reductio ad absurdum* of the insane sitting in judgment upon the insane.

§ 126. From the inherent difficulties attending psychological inquiries carried on in the face of the most critical opposition; one side feeling that they must at every hazard prove insanity, and the other that they must with equal pertinacity, disprove it—between such contending tides of legal dialectics, the position of any expert becomes exceedingly embarrassing. Expected to prove what is not always susceptible of proof, and to define what can only be described, he is required to perform feats of mental legerdemain which would do credit to a Greek rhetorician. Presumed also to be in the interest of the party who calls him, other experts, known to differ from him in their views of the essential causes, or phenomena of insanity, are summoned as direct antagonists, and a glad-

iatorial contest is thus prepared for the ostensible purpose of enlightening a jury of laymen upon matters, which the profoundest philosophers can not agree in explaining.

In this perplexing strife of words, where both court and counsel are often at sea, each one seeking for some plank upon which to float, what can an expert offer that will be satisfactory to all? The general rule of law regulating his testimony is simple and well understood, but the manner of conducting his examination is calculated rather to embarrass than to assist the discovery of truth. Particularly is this the case where he is expected to prove, to the satisfaction of the jury, the correctness of his judgment in a matter, which is not so much an objective fact, as a deduction from professional experience. The preposterousness of the undertaking is only equalled by the pertinacity with which he is often pressed to communicate in a breath, that wisdom in observation requiring years for its attainment. And failing to make others see with his own eyes, the value of his opinion is accordingly impeached, on the ground of its illogical foundation.

§ 127. It is from this misinterpretation of the office of an expert, that arises that perpetual misunderstanding between lawyers and physicians in trials involving medical testimony. That it is unnecessary all must agree. That it is an obstacle to the discovery of truth, the history of every case serves only to exemplify, and that it is an obstacle to the course of justice a moment's reflection will suffice to show. Under the shadow of these convictions, it becomes the duty of both professions to endeavor to eliminate from the field of their common labors, all causes of, and all provocations to differences of opinion. But it is hopeless to expect this while either profession refuses any concession to the other. Although this is never of diffi-

cult application in any case, since the good sense of the law, condensed in a maxim pregnant with appropriate suggestiveness, expressly silences all carping criticism—*cuilibet in sua arte perito credendum est.* An expert's opinion can not be doubted by a layman. He overpeers him *quoad* his own specialty, and his opinions therefore can only be rebutted by those of other experts. A proper knowledge on the part of counsel of the just limits of inquiry, and of the sphere of possible demonstration possessed by the expert will prevent much needless cross-questioning. There are some questions which should never be asked, because they are simply absurd, and involve either a *petitio principii* at the start, or select some extraordinarily exceptional case as the basis of an universal law. *Why* a physical law acts in a particular way is no concern of ours. Its existence is an answer to all inquiries into its necessity. It must suffice us to know *how* it acts, and not arrogantly inquire *why* it was so made.

§ 128. Much of the difference and mutual incomprehensibility of lawyers and medical experts, arises out of the different standpoint from which each party envisages the case. Counsel have a direct interest in making their proofs accord with their allegations. Indeed, their interest in the premises limits them to the necessity of finding nothing beyond this, because, if a different construction can be put upon the propositions advanced by them, the opposite party will be sure to avail himself of it. Consequently, the answers sought to be obtained from the expert are in the nature of absolute and irrefragable conclusions. On his part, the expert having no interest in the issue, seeks merely to resolve the problems set before him in the simplest and most precise way. It is, certainly, not for the interest of his own reputation that

he should complicate this problem, or make it an unintelligible one to the jury. The whole tendency of his testimony is, as a matter of policy, towards truth, and every presumption that it is so should weigh in his favor.

Counsel having the vantage ground in the examination, should bear this fact in mind, and not commit the error which, in this instance, is more truly an injustice, of questioning the expert exclusively to the limit of proving specific allegations, by narrowing his answers to the simplest affirmations or negations of categorical propositions, thus converting him into a mere party witness. His examination should stand upon a broader foundation than this, or if persistently cramped by a demand for absolute and unqualified answers, then, the expert should carry in his replies so large a measure of explanation as to show, that every fresh affirmation of a truth in physical science, being the application of an universal law to a particular instance, is only a relative phenomenon, not susceptible of positive or absolute proof, and that our best efforts at discovery constitute after all, but an approximation to truth, rather than a mathematical demonstration of it. A good case being in harmony with truth has always a multitude of coincident principles to support it, for truth polarizes all things into which it enters, and causes a wonderful parallelism between even the most apparently dissimilar ones, while error, though propped up by adventitious aids, dares scarcely to move from her precarious foothold. Whenever counsel fears to allow an expert to explain himself in his testimony, by qualifying his language, and seeks to narrow his answers to the baldest possible statements, there at once arises a presumption that either his case is a weak one, or that he feels incompetent to conduct it. Under such circumstances the expert should decline to

form an opinion upon one or two selected facts, purposely stated to entrap him into such an expression of judgment, as would be tantamount to an absolute adjudication of the fact at issue.

§ 129. These views explain the difficulties which *ab origine*, stand between counsel and experts, and to expect that they can be done away with, is to expect that legal controversies will cease, and tribunals of justice no longer be required. So long as there are two sides to every suit at law, and counsel are retained to advance either view of the case, the expert and opposite counsel will appear to stand in antagonism to each other. We say appear, because this difference has no foundation in reason, but only in the fact of the different part assigned to each by the technical necessities of the legal drama. If experts could be selected and summoned by the court alone, so as to stand as true *amici curiae*, and if their examination in chief could be restricted to the court solely, they would be placed above the reach of any possible assumption of bias towards either party. For this, after all, is the true position of every honorable expert. He is not an ordinary witness. He has no concern with the issue. It is nothing to him which side wins or loses. Although personally present at the trial, he is only impersonally related to it. His heart is not so much to be consulted as his brain, in delivering his opinions. In fact, he has no business to have any feeling in the matter at issue, or to enter into the merits of the controversy. Like a faithful microscope, he should simply enlarge the field of vision of others, and bring out the concealed proportions of objects which, in turn and like a mirror, he should content himself with reflecting.

§ 130. In respect to qualifications of experts in insanity,

no precise rule has as yet been laid down.[1] And this is the more to be regretted because of the fact that the disease is not one of familiar acquaintance with physicians as a class, many spending a life-time in the practice of their professions, without ever personally attending upon a case. The majority may be said, therefore, and without casting imputation upon their professional excellence, to be wholly inexperienced in insanity, and as such, incompetent to testify as experts in controversies upon this issue. And yet it has been held that physicians in *general* practice, and *nurses* accustomed to attend upon the sick, are experts in relation to the mental capacity of sick persons.[2] Mental capacity to do what? Until this question is answered, it is impossible to determine what is the intent or purport of the term. Any intelligent witness can testify whether a sick person had mental capacity enough to understand and reply to a simple question, for this is defining the purview of the term employed. But when it is broadly and without qualification asserted that physicians (meaning *all*) in general practice, and professional nurses are, *ipso facto* experts, as to the existence of mental capacity for any purpose to which that capacity may be applied, we submit that the proposition as thus stated is eminently illogical.

§ 131. And, further on in the same decision, the court proceeds to lay down the remarkable principle that a physician, admitted to be an expert in insanity, is not competent to testify to the *mental capacity* of a person not

[1] Powell *v.* State, 25 Alab. 21.

"The opinions of *medical* men are evidence on a question of insanity. Such opinions may be stated, even on the facts proved, though the physician may not have seen the patient." State *v.* Windsor, 5 Harring. 512.

[2] Fairchild *v.* Bascom, 35 Vermont, 398.

previously insane, but in the last stages of disease![1] In other words, the effects of disease upon mental capacity are wholly ignored or repudiated where an expert in mental capacity is summoned to testify, and completely recognized and admitted where physicians and nurses, who are not experts, are called as witnesses. This may pass for metaphysics, but it certainly is not law, since it violates both reason and justice, and ignores the essential element of experience which constitutes a skilled witness. As an opposite doctrine to the one first enunciated, it has been held that a physician can not testify that the deceased had sufficient capacity to make a will, the question being on a will.[2] And in contradiction of this latter one, it was ruled, upon the trial of an issue of the sanity of a testator, that a physician who had practiced for many years in his neighborhood, and had at times been his medical adviser, and who saw and conversed with him a short time before the making of his will, is competent to state his opinion of the testator's sanity, though he is not an expert on the subject of insanity.[3]

Again, and contradicting the foregoing, the same court has subsequently decided that a physician who has not made the subject of mental disease a special study, but who, when his patients have required medical treatment on insanity, has been accustomed to call in the services of a physician who had made this subject a special study; or to recommend the removal of the patient

[1] "A physician who, for more than thirty years has devoted his attention almost exclusively to the treatment of insane persons can not be admitted as an expert to testify as to the mental capacity of a person not previously insane, but in the last stages of disease." Fairchild *v.* Bascom, 35 Vermt. 398.

[2] Walker *v.* Walker, 34 Alab. 469.

[3] Baxter *v.* Abbott, 7 Gray, 71.

to an hospital for the insane, *is not competent* to testify as an expert upon an hypothetical case put to him; nor to testify whether a person living in his neighborhood, and well known to him, but who had never been his patient, was competent to apply the rules of right and wrong in a state of circumstances concerning which he was under high excitement, or the influence of an uncontrollable impulse.[1]

§ 132. These conflicting opinions by the same court show plainly enough how indefinite has been the standard adopted in discriminating between physicians as *ordinary* and physicians as *skilled* witnesses.[2] Some judges have

[1] Comm. *v.* Rich, 14 Gray, 335.

[2] Sometimes the distinction between a general expert in insanity and one become so *pro hac vice*, has been made so subtle as to be followed with extreme difficulty in any attempt to apply it to other cases. Thus, a physician who had visited the defendant in consultation with his attending physician, was not permitted to give his opinion of the mental condition of such party at that time, based upon representations made to him at the time by the defendant's wife, physician, or other attendant, *and taken in connection with symptoms discovered by personal observation. His opinion, it was held, should be formed entirely from his own examination of his patient's condition.* It would have certainly added very much to the perspicuity of this decision if the court had pointed out the distinction between an opinion formed by an expert from symptoms discovered by personal observation and an opinion formed entirely from his own examination of his patient's condition. To us it appears as a distinction in name, and without any difference in fact. Heald *v.* Thing, 45 Maine, 392.

This principle was further established and reaffirmed in the following case: The issue on trial was upon the testamentary capacity of Joshua Whetherbee, when he executed the will in question, in April, 1861. In the previous February, the witness, Dr. Thayer, Professor of Anatomy in the University of Vermont, an expert, visited him professionally, and found him at that time diseased in body and mind, and mentally incapable of transacting business understandingly. The contestants claimed that the disease under which he was suffering was softening of the brain. To establish this, they were permitted, against objection, to prove by the same witness, Thayer, his opinion to that effect, based, as he said, in part upon his own examination, but mainly upon what he was told on that occasion,

adopted the fallacy, at the start, of considering all physicians as competent to express an opinion in issues of insanity, from the assumption of its recognized association with medical topics. This is undoubtedly true in the abstract, and yet it is but partially true in relation to its forming a necessary part of the professional experience of all physicians, since the majority, as a class, have no practical acquaintance with it. Again, had courts always adhered strictly to the universally accepted definition of the term *expert*, as limiting it to one *instructed in any science by experience*, there would have been no opportunity to misinterpret the character of any witness. Each court appears to have confounded the witnesses ordinary professional experience with his special skill as an expert, at times enlarging, and then again restricting the sphere of his testimony.

Thus, in a trial involving the question of the insanity of a person, it was held that a medical witness who has heard the testimony may give his opinion as to such person's sanity or insanity as indicated by any given state of facts, so long as such facts are warranted by the evidence, and are not conflicting.[1] But in a similar case in New York, the court ruled that even where the medical

for the purpose of that examination, out of the testator's presence, of his previous symptoms and condition, by one Dr. Cram, who was the patient's attending physician during his whole sickness. It appeared that Dr. Cram deceased before the trial, and that Dr. Thayer's visit to the patient was at Dr. Cram's request, and in his company. It did not appear that Dr. Thayer did, or could form any opinion of the disease by the examination alone, unaided by Dr. Cram's relation to him of the patient's previous symptoms and condition. Nor did it appear that Dr. Cram's relation was truthful and correct, nor that it corresponded with the state of facts, which the testimony on either side tended to establish. Held, that the objection to Dr. Thayer's testimony of his opinion was well taken. Whetherbee's Exrs. *v.* Whetherbee's Heirs, 38 Vermont, 454.

[1] Fairchild *v.* Bascom, 35 Verm. 398.

witness has heard all the testimony, his opinion founded thereon upon the general question of sanity or insanity, is not competent evidence.[1] This latter ruling would commend itself to our reason for denying to the expert the right of deciding the issue, were it not practically negatived by allowing him that right in another part of the judgment, in the course of which it was said, that, where a physician conversant with the disease of insanity has had sufficient previous opportunity by his own observation to become acquainted with the personal habits, conduct, and appearance of the person, he may be asked the general question, and give his opinion as to the sanity or insanity of the prisoner. Under this concession of a judicial character to the expert, we may truly say with Baldus that his testimony would be *magis judicium quam testimonium.*

§ 133. In the leading American case[2] upon this subject, C. J. Shaw, speaking of the frequent necessity of calling in skilled witnesses, said: "It is upon this ground that the opinions of witnesses who have long been conversant with insanity in its various forms, and who have had the care and superintendence of insane persons, are received as competent evidence, even though they have not had opportunity to examine the particular patient, and observe the symptoms and indications of disease at the time of its supposed existence. It is designed *to aid the judgment of the jury* in regard to the influence and effect of certain facts which lie out of the observation and experience of persons in general. And such opinions, when they come from persons of great experience, and in whose correctness and sobriety of judgment just confidence can be had,

[1] People *v.* Lake, 2 Kern. (N. Y.) 358.
[2] Comm. *v.* Rogers, 7 Metc. 500.

are of great weight, and deserve the respectful consideration of a jury."

Granting these principles to be sound in themselves, and of general acceptance, they still overlook the fact that the question thus put to the witness, involving a general answer to the facts at issue, as being proved or not proved, can not be asked as a matter of right, and if so, has no proper standing in the law of evidence.

The acquittal of McNaughten for the murder of McDrummond, on the ground of insanity, at the Central Criminal Court in 1843,[1] gave rise to a discussion in the House of Lords, and among the questions of law propounded to the judges in relation to the law respecting crimes committed by persons alleged to be insane, was the following:

"Can a medical man conversant with the disease of insanity, who never saw the prisoner previously to the trial, but who was present during the whole trial, and the examination of all the witnesses, be asked his opinion as to the state of the prisoner's mind at the time of the commission of the alleged crime, or his opinion whether the prisoner was conscious at the time of doing the act, that he was acting contrary to law, or whether he was laboring under any, and what delusion at the time?" To this, C. J. Tindall replied, "In answer thereto, we state to your lordships, that we think the medical man under the circumstances supposed, can not in strictness be asked his opinion in the terms above stated, because each of those questions involves the determination of the truth of the facts deposed to, which it is for the jury to decide, and the questions are not mere questions upon a matter of science, in which case such evidence is admissible. But

[1] 1 Carr. & Kir. 130, n.

where the facts are admitted, or not disputed, and the question becomes substantially one of science, it may be convenient to allow the question to be put in that general form, though the same can not be insisted on as matter of right."

§ 134. The great danger in the admission of testimony of opinion, is in the unbounded scope which the ingenuity of counsel will give to it. The expert of course, is not to blame for this. If the court allows him to be asked a question in such form that his answer practically decides the case, he has an undoubted right to give such an answer. And if the opposite party do not object at the time, they can not afterwards raise the point on an appeal. They are precluded by their own presumed assent to the proposition as originally addressed to the expert. This has long ago been recognized as a matter of the last importance in the examination of skilled witnesses, and is seldom overlooked in trials where they appear. Hence the limitation of their testimony to inductions by analogy, rather than by direct judgment upon the facts in the case itself. Where, therefore, the defence is insanity, a witness of medical skill may be asked whether such and such appearances proved by other witnesses are, in his judgment, *symptoms* of insanity; but he can not be asked if the act with which the prisoner is charged, is an act of insanity, for this is the very point to be decided by the jury.[1] He can only be asked whether the facts proved show *symptoms*, nothing more, because this is all he can be permitted to say, and the jury are the ones to draw the inference, which in fact is the judgment in the case.[2]

And where facts on one side conflict with facts on the other, they should not be incorporated in one question;

[1] Rex *v.* Wright, R. & R. 456. [2] Rex *v.* Searle, 1 M. & Rob. 75.

but the attention of the witness should be called to their opposing tendencies, and if his skill, or knowledge, can furnish the explanation which will ultimately harmonize them, he is at liberty to state it.[1] In like manner, it is improper to inquire of a medical expert whether the person in question possessed sufficient mental capacity to transact business, or to make a will. But the question should be so framed as to require the witness to state the degree of such person's intelligence, or incapacity, in the best way he can.[2] For neither professional nor unprofessional witnesses can give an opinion as to mental capacity or condition, without first showing the facts upon which the opinion is founded.[3] Sometimes, indeed, courts have permitted questions of a purely metaphysical character to be put to experts, as for instance, whether the facts stated by the witnesses, supposing them to be true, show a state of mind incapable of distinguishing between *right* and *wrong*.[4]

§ 135. Of this test it is not asserting too much to say that it is the least valuable of any ever invented by human

[1] Fairchild *v.* Bascomb, 35 Verm. 398.

In this case, involving the question of the sanity of a testatrix, the testimony on the opposite sides as to her sanity being very conflicting, the following question, put to an expert on the subject of insanity, was held to be improper, as involving so many facts that the witness would be obliged, in order to answer it, to settle in his own mind other disputed facts disclosed in the testimony; in other words to assume the province of the jury. The question was as follows: "*If the facts stated by the witnesses on the part of the defence touching the physical condition of the testatrix, and her symptoms and conduct are true, and the testimony* of the witnesses on the part *of the plaintiffs, relating to her conduct is also true, what, in your opinion,* was *the mental condition of the testatrix* in *respect to sanity or insanity,* at the time *of the execution of the will?*"

[2] Ibid. Walker *v.* Walker, 34 Alab. 469.

[3] White *v.* Bailey, 10 Mich. 155.

[4] McNaughten's case, 10 Cl. & Finn. 200.

ingenuity, to measure mental unsoundness. It is one of the idols of the mind, as Bacon would call it, born in the market-place, and though ennobled by adoption into moral philosophy, is of a most unreliable character as a standard of human responsibility before the law. It is only a coincident symptom of sanity, but never an absolute one. And the statistics of any asylum for the insane would show that full as many of the inmates enjoyed this faculty as there were without it. For, "every age and country will bear witness to the fact that right and wrong are questions of feeling, as well as of reason, and regarded by men variously, in the abstract, no less than in the concrete. Individually, too, the innate sense of justice which moralists assert, dwells in every one, is always subordinated to laws of temperament, disease or influences of education. The knowledge or conviction of right and wrong is separate from other pure mental states, with which it may or may not sympathize and suffer. Hence it is not necessarily, nor wholly destroyed in insanity. And its presence should not be taken as evidence against the existence of such a state, for it may coexist with the most perfect delusion. The bridge which unites the abstract to the concrete may be broken in some part, and the mind which knows right from wrong in the universal sense, may not be able to trace or follow its application out, in a particular instance.[1]

"This is the quicksand in which courts are too apt to bury themselves, by concluding that if a man knows right at all, he knows and feels its binding obligation in every particular instance; and the same may be

[1] Estque intellectus humanus instar speculi inequalis ad radios rerum qui suam naturam, natura rerum immiscet, eamque distorquet et inficit. Nov. Organum. Aph. XLI.

said of wrong. Whereas, in fact, a case of insanity seldom exists in which there is not such knowledge, and where too (as always appears most incongruous to a layman) reason is not found in juxtaposition with unreason, precisely as a man with a broken leg has some power of motion still, although the fulcrum upon which the muscles exert themselves is wholly impaired; in other words the muscles may act independently of the bone, but in such case they act at random. The knowledge of right and wrong, as either a direct or collateral standard of mental health and consequent responsibility before the law, must be abandoned. It is of no more value in fact, than the knowledge of one's own personality, and few indeed among the thousands of lunatics who fill our asylums, do not possess that. It is a sign of little value in any case, and has, unfortunately for the cause of justice, always been unduly magnified in importance."[1]

§ 136. But whatever the character of the evidence given by the expert, it is a well-settled principle that his deductions must be founded upon the largest measure of knowledge which the case can afford him. As he is expected to analyze the relations of a series of facts more or less complicated, it is made incumbent upon him to possess himself of the entire field of observation necessary to interpret such facts. Where, therefore, a physician is examined as an expert upon a trial for the purpose of giving an opinion, whether or not, the facts proved amount to evidence of insanity, his opinion must be based on *all* the testimony relating to the matter, and if he has heard only a part, his opinion is inadmissible. Nor can he give

[1] Vid. article on the History and Philosophy of Medical Jurisprudence, by the author, in American Journal of Insanity for October, 1868, p. 37.

an opinion founded merely upon the previous testimony as to the state of the person's mind. Since, to give such an opinion, he must determine upon the truth of the testimony he has heard, which is a matter of fact for the jury. The proper course is to ask him whether such facts as have been sworn to would, if they existed, indicate insanity.[1] And if a medical witness has heard only a part of the testimony on which the prisoner's counsel relies to establish his defence, it is erroneous to permit such witness to give his opinion as to the prisoner's sanity, where such opinion is founded on the portion of the testimony so heard by him.[2]

§ 137. Again, a medical witness examined as an expert on a question of insanity may be asked his opinion upon a *hypothetical* statement of facts,[3] and he may also be asked what are the symptoms of insanity. But whether such facts exist, or such symptoms are proved, it belongs exclusively to the jury to decide. In relation to the hypothetical form of the question, it has come to be regarded that this is the only unobjectionable mode in which the inquiry can be made of the expert, since the direct question involves the very issue which the jury are to decide, and his opinion is exclusively intended to be an intermediate inference between the facts and the verdict, leaving the jury free to accept it or not, as they please.

Accordingly, it has been well said that, although the opinions of medical men are entitled to more weight than

[1] 2 Grlf. Evid. § 373; 1 Phillips Evid. 290.

An expert who has heard all the testimony in a case as to sanity may be asked what his opinion would be, upon the hypothesis that the testimony given by the witnesses is all true. Negro Jerry *v.* Townshend, 9 Md. 145.

[2] People *v.* Lake, 2 Kern. 358, and 1 Parker, 495; Reed *v.* People, 1 Parker, 481.

[3] Lake *v.* People, 1 Parker, 481.

those of others on a question of sanity, yet on such issue the jury should find according to the whole evidence, although they find against the opinion of the medical witnesses examined.[1] This is putting expert testimony upon its proper footing, which is that of interpretation and not judgment; placing it upon the widest field of impartial rendition, and at the same time absolutely defining its territorial limits. It must never be forgotten that experts are not jurors—they are not even party witnesses, and their testimony must stand like any other fact before the court in its determination of the issue. In the celebrated Huntington case, tried in New York, counsel were only allowed to put hypothetical questions to the experts. One of these interrogatories occupies nearly two pages, recites all the facts illustrative of the defendant's character and conduct, and yet studiously avoids the extortion of such a categorical answer as would amount to a decision of the very point at issue.

§ 138. But a far wider field for ceaseless, may we not also say for causeless, difference, specious cavilling, and useless wrangling presents itself to us in the loose, illogical and ambiguous form in which questions are often put to experts.[2] Just in proportion as the direct examination is lucid and forcible, and the expert seems establishing the case for the party calling him, will the cross-examination be likely to be confusing and vexatious to him. By a negative application of any universal law, particular instances under it may frequently be made to contradict

[1] Watson *v.* Anderson, 13 Alab. 202.

[2] In the case of the People *v.* Freeman, counsel, on cross-examination, asked Dr. Brigham the following illogical question involving a *petitio principii* and its own answer: "Suppose I should get an *insane* delusion that one of the jurors owed me, and should kill him, would you swear I was insane?" Case of Freeman, Pamphlet Rep. Auburn, N. Y. 1848.

each other, according to the dialectical method of the sophists, so that any expert, if off his guard, or less skillful in intellectual fencing than counsel, may be made to contradict himself by a method "of asking questions adroitly chosen for their logical relations to the doctrines in dispute, and making the answers obtained, the premises from which conclusions are deduced at variance with the doctrines of your antagonist, and yet consonant with his admissions in the answers to your questions."[1] And although cross-examination be one of the greatest accomplishments in a lawyer, and all essay to practice it with fervor, few men, without systematic logical training, perceive that they as often stultify themselves in the form of propounding questions, as the expert may in his answers to them. The instance taken from the Freeman case, above cited, forcibly illustrates this.

It does not follow because a man is authorized to ask questions that he is necessarily wiser than the one who is required to answer them. An examination may be as much for the personal information of the questioner, as to test the knowledge of the party questioned. Indeed, the logical inference would be as much against such a presumption as in favor of it. And following it to its natural sequence, a case involving expert testimony is certainly one in which the former inference would obtain. Hence, by protracting the cross-examination of an expert, and reducing it to a simple exhibition of logomachy, there is as much danger, and even more, that the lawyer, however skillful a trial engineer he may be, will be "hoist by his own petard," as that the expert will contradict or stultify himself, provided he avoid the temptations to branch off, so sedulously

[1] Progress of Philosophy, by Samuel Tyler, LL.D., Phila. 1868, p. 16.

offered him, and instead, confine himself strictly to the subject matter which forms the thread of his examination.

§ 139. Unfortunately, however, for the cause of truth, fallacies in argument are so common, and even purposely indulged in, that men at last lose the perception of their true character, and employ them unawares. These fallacies being useful in dialectics, as feints are in fencing, to make an adversary uncover himself, eventually pass as current coin with the multitude of lawyers, because of the ready aid they afford for reaching a desired point. In the propounding of questions to experts, no attention being commonly paid to the ultimate laws of intelligence, and their answers being often demanded in such a way as to exclude comparison between the laws of identity and those of contradiction, it follows that, with a necessarily excluded middle, the conclusion arrived at may enunciate a practical contradiction. Accordingly, we have fallacies derived from an ambiguous middle term in a proposition; fallacies from confounding resemblances of things with their analogical character; fallacies from using the customary rather than the etymological sense of a word; and fallacies of the *petitio principii* order. The great dictum of Aristotle, *de omni et nullo*, is the proper foundation for an universal law, but no one reasonably expects more than an analogy between the majority of particular instances under it. Innumerable fallacies flow from the attempt to draw absolute inferences in the operations of nature, where only relative ones can be discovered. And as the expert is, by many, presumed to possess ontological knowledge, and to be able to solve all manner of questions by a process of pure intuition which discards the lower operations of induction, he is accordingly plied at times with the most

irrelevant interrogatories, and accused of incompetency, if he cannot answer them.

§ 140. Thus, universal propositions, and necessarily indefinite in character, are laid down, from which an expert is expected to infer absolutely a particular conclusion. Overlooking the principle that in every special question is included the general hypothesis as its antecedent, but not contrariwise, an attempt is made to force identity into phenomenal manifestations, where in fact none such objectively exists. By commuting the subjective with the objective, we are enabled to draw ourselves, or make others draw, almost any conclusions which we may desire. But if we bear in mind that propositions may be hypothetical and modal as well as categorical, it is plain that answers must vary accordingly. To demand them exclusively in a categorical form, as counsel often do, is both illogical and at times impossible of execution. For it is a well recognized truth that, in the domain of physical nature, the mutual interdependence of all correlated phenomena renders every proposition more or less hypothetical. We begin and end with the assumption that what has been, may be again. But everywhere we meet with exceptions which teach us that this law, however universal in its application, is liable to be met by contingencies that modify its operations in particular instances. We are taught by this experience the fallacy of treating contingent problems, whether they relate to the laws of mind or matter, as though they were mathematical propositions, or questions in pure logic, reducible by the dogma *de omni et nullo*. Hence, it should never be forgotten that while in necessary matter all affirmations are true and negatives false, in contingent matter all universals are false and only particulars true.

§ 141. Thus, for instance, questions like the following are often asked, and categorical replies to them insisted upon: *Are, or are not, wounds of the head, or brain, or lungs, or heart, &c., mortal?* It is plain that to all such inquiries no one can give a directly affirmative or negative answer, and at the same time state the truth. All these wounds may, or not, have proved mortal in the midst of similar or different circumstances. And it is next to impossible to predict the probable result of a wound, until an expert knows its locality, extent, and the medical history of the patient, as a basis for his induction. In losing sight of the element of contingency in such questions, we overlook the hinge of the whole problem.

Again, an intercurrent disease cuts down a wounded man, and the expert is asked, "*Was the wound or the disease the probable cause of death? Did the wound originate the disease? Would the disease without the wound, or the wound without the disease, have caused death? Was the disease latent at the time of the wounding? Is there any necessary connection between the wound and the specific disease? Does such a disease invariably, or even generally, follow wounding?* The obvious fallacy here consists in mistaking the occasion of an effect for its cause. A wound may be the occasion of a development of some disease like erysipelas, but certainly not its cause, precisely as a man going out at night may be robbed, and the fact of his being out would furnish the occasion for his robbery, but could not be considered its cause. No one can predict therefore that a wound will necessarily be followed by erysipelas, any more than he can by tetanus, and in the event of a death following both a wound and a disease, it is next to impossible so to apportion the influence of either cause, as to say which was exclusively dominant in the production of this result. As-

suming, as we have a right, that reaction and reparation continue throughout life, the probabilities may be as much in favor of recovery from a serious wound, as from a slighter supervening disease acting upon a debilitated system.[1]

§ 142. Diversities of opinion among medical experts upon not only the *causa causans* of insanity, (which is doubtless as permissible as upon the *materies morbi* of cholera,) but upon the evidence of its existence as revealed through existing symptoms, constituting, as this latter does, the whole subject matter of the expert's investigation; diversities of opinion upon this fact in issue, have done more to impair the value of medical testimony before courts than any other thing. For, wide as is the permitted range of scientific observation, and of individual opinion therein, there are yet subjects about which it is not tolerable that its high priests should differ *toto coelo*. Does insanity exist, or does it not? That is the main and single point of inquiry for the expert, as indeed it is for the court to determine. All questions of types, or complexions of the disease, are matters of subordinate importance to the cardinal inquiry above. Experts may indeed differ as to the degree of accentuation of these manifestations, but it is not equally justifiable to differ about the fact of insanity itself. If it be a disease, as all admit, it must present some indications of itself, whenever it exists, and again, these must be absent when it does not. Nature never lies. Her phenomena are always the expression of causal laws. And we have no right to assume the existence of a state of things, of which we

[1] Though presumptions presuppose unvarying uniformity in the laws of nature, yet this latter is subject to great modifications in the human body; thus temperaments are *congenital*, diatheses *acquired*.

So, injuries comparatively slight may, *cumulatively*, cause death, and the question may then arise, *which injury was the mortal one?*

have no objective proof. In investigations of this kind we are not at liberty to enter the domain of speculation, for that would take us beyond the practical questions of life, and into the sphere of the infinite. The inquiry in cases of alleged insanity must be narrowed down to one involving as positive demonstration, as the complex circumstances of human nature will permit. And, in every event, the induction must rest upon facts.

§ 143. It is greatly to be regretted, moreover, that in this field, in particular, questions of a purely metaphysical kind are not only asked by counsel but tolerated by courts, which questions can never be said with propriety to be relevant, being so indefinite in character as to express nothing germane to the point at issue. Take the following, for example, as some which might be asked for the purpose of disconcerting an expert, and lowering his opinion before the jury :

Is there such a thing as a perfectly sound mind?

Is disease of the brain necessarily a case of insanity?

Is the mind produced from the brain, or does it exist without it?

Does increase in the volume of the brain increase the scope of mental power?

Does quality of brain develop mind, irrespective of mass? and if so, what is quality?

Is the mind equally dispersed throughout the brain, or does it reside in portions only? and if so, in what parts?

If parts of the brain may be injured without affecting the mind, is that proof that no mind ever existed in them?

What are the emotions, and whence produced?

Is the mind related to them subjectively or objectively?

How does mind act on matter, or vice versa?

What is a nervous influence? Is it sensation, or self-consciousness materially expressed?

Is there any insane act in itself?

It is needless to say that nothing is ever gained by such questions, save the doubtful advantage of appearing to puzzle the expert. In the eyes of the jury this may indeed impair the value of his testimony, but a case carried by such means, reflects little credit upon its advocate, or the court in which it has been permitted to triumph by indirection.

§ 144. Again, it is often asked *whether want of self-control indicates insanity*? The term, itself, implies so wide a sphere of potentiality, that unless both parties understand at the outset the exact sense to which its use is limited, the question can not in such form be answered. Insane persons are found both with and without power of self-control; and contrariwise the sane are often found without it under certain definite circumstances. No one deems a man insane, because he becomes heated in debate, or grows warm and enthusiastic on a subject which is of particular interest to him. These are manifestations not at all incompatible with perfect mental health, and depend very much upon mobility of temperament. The lymphatic man may

> "Sit like his grandsire,
> Cut in alabaster,"

impassive beneath influences which would inflame and infuriate a sanguine temperament to irrepressible action. Yet both may be equally sane, though representing opposite poles of sensibility. We can not, therefore, deduce insanity *a priori* from want of self-control, until informed of all the circumstances of the particular case. Under the shadow of any absolute opinion expressed in ignorance of these facts, we should be opening the door to such sweep-

ing generalizations as would force us inevitably into the most ridiculous conclusions, and it might be logically proved that a man who could not control an impulse to cough or sneeze was *ex vi termini* insane.

§ 145. Adopting also the favorite legal dogma that delusion is the true test of insanity, the question is often broadly asked "*whether hallucinations are not a proof of insanity.* Now it is a well-known fact that hallucinations are perfectly consistent with reason, notwithstanding they are almost invariably the accompaniment of unreason.[1] It is not the hallucination *per se* which proves insanity, but the inability to correct it. Some of the greatest minds, like Socrates and Pascal, have been victims to occasional hallucinations, knowing them all the while to be such. Care must further be taken, also, not to confound an illusion with a hallucination, since they are essentially of different origin. The respectable tipler returning home *coenis antelucanis*, who sees the pavement rising in teasing waves before him, or finds his key-hole stolen, suffers an illusion merely; but when, farther along the Bacchanalian descent he falls into the pit of *mania-a-potu*, and sees devils, or slimy reptiles, crawling over his bed, or hears sibilant fiends searching for him, then he is the victim of a hallucination. The one error is of objective origin, the other is purely subjective.

§ 146. Another question often asked is this: "*May not insanity exist without our ever being able to discover it?*" In relation to such an inquiry, it may be said to be a wise maxim in law that "*de non apparentibus et non existentibus eadem est ratio*," and we have no right to indulge in guesses where rational proofs are necessary. That surely is no

[1] Vide "Hallucinations Consistent with Reason," an article by the author in the American Journal of Insanity, vol. 17 (Apl. 1861), p. 359.

insanity, which we cannot discover to be such by some well-marked objective symptoms. We might with equal reason *infer* the guilt of any prisoner undergoing trial, on the hypothesis that it might exist without our being able to discover it, and that, consequently, he should be adjudged guilty whenever we *conjecture* him to be so. If, therefore, insanity may exist without even being discovered, and a single criminal act of a party, inexplicable and motiveless, is at once accepted as conclusive proof of an antecedent insane state, then the question legally arises how we can connect two states of mind, one of which being purely subjective, and without external phenomena to reveal it, no one but the alleged insane party can be said to have known. Without any other evidence than subjective symptoms related to us by another, who may himself be deceived in correctly interpreting them, shall that man be pronounced insane who, exhibiting no aberrations of intellect, or loss of control of the will, yet tells us he has irrepressible desires to do wrong? Is it not a most glaring *petitio principii* to assume that to be whose existence we seek to prove? And if we find no evidence of insanity in the habitual conduct of a party, yet permit ourselves to infer it from a single act of wrong-doing, because he asserts himself to have had an irrepressible desire to commit this particular act, how do we know that, at the very moment of telling us so, he may not be laboring under an irrepressible desire to falsify the truth? Certainly, if we can find no objective symptoms to substantiate his *ipse dixit*, there is no reason why we should believe a man to be insane simply because he asserts a subjective fact, and which fact, being in contradiction to the general laws of nature, is never to be presumed, but must always be proved by some form of continuous exter-

nal and objective manifestation. Without objective symptoms susceptible of affirmation in evidence, no insanity can be said to exist in contemplation of law.

§ 147. And as to other questions, looking to things *in posse*, such as, *whether a sane man would or would not do a particular act; a sane parent murder its offspring; or a sane child its parent?* In relation to these questions, exhibited for the purpose of forcing an expert into the admission of such primary beliefs of the *characteristics* of mental health, as would justify their assumption as *tests*, it may be said that, like all inquisitions into the future, the ability to answer them belongs more to the sphere of prophecy than to that of induction. What any man *would do* under a given state of circumstances, can only be known to the Deity. Though if it were asked what a particular man would be *likely* to do, then, by first knowing all about him, we might draw a general inference touching his *presumable* conduct, but nothing more certain than this. For, after all that has been, or may be said upon this vexatious subject, the conclusion is always forced upon us that nothing *absolute*, relating to future conduct, can be predicted by one human being of another, and the inquiry ultimates in driving the mind to repose itself upon the testimony of our primary beliefs. We can only state what we deem the probabilities to be, leaving possibilities as beyond our scope of vision. All answers relating to probabilities of human conduct must, necessarily, be of the most qualified character, since it could be shown, to the entire negativing of an expert's testimony, that men under similar circumstances have acted with the greatest and most incomprehensible dissimilarity.

§ 148. Again, in the case of an insane person, it may be asked "*whether such party is not harmless, and so entitled to*

his liberty?" Insanity when once established in the mental constitution is so treacherous a disorder, that it may be said to have no definite laws of incubation, progress, manifestation, or retirement. The ordinary revelations of convalescence noticeable in other forms of disease, are not to be relied on in this one, but protracted oscillations between acute phenomena and apparent lucidity often continue for indefinite periods. The tendency to reproduce, and re-exhibit itself under the stimulus of exciting causes of varying degrees of intensity, some so slight as to be impalpable to healthy minds, justifies the conclusion that the period of convalescence from insanity is longer than from any other bodily disorder; and that, moreover, the successive stages of improvement are not so cumulative in character, as to afford permanent security against relapses, under even the most favorable circumstances. The tendency to fresh exacerbations may be said to lurk far beyond the limits of the last expressed aberrations of thought or conduct, and many months must be consumed in patient well-doing and waiting, before we can safely assume its entire extinction.

The fact, therefore, that an insane person is harmless now, does not justify us in predicting that he will necessarily continue in that state, so long as we have any reason to suspect that the disease is not yet eradicated. For, until a sufficient period of observation has occurred to justify the conclusion, that the disease has expired by limitation, experience does not authorize us to affirm that mere *quietness* proves absolute mental soundness, although it may denote a step in that direction. It may be said in fact that the phases which insanity reveals are so often of obscure interpretation, and, when taken singly, of such variable value,—an apparently trivial one at times completing the chain of

evidence, and a more demonstrative one adding nothing, *per se*, to the diagnosis of the disease,—that we are always justified in believing, wherever insanity is present, that, beyond the sphere of its immediate manifestations, and eluding the researches of the most expert observer, there exists a domain of disturbed functions which is altogether impenetrable to finite minds. What may be going on there no one knows, nor can any one say how soon the explosion of a new disturbing element may not add expression to already deranged functions, and cause them by direct, or reflex agency, to radiate their disorder upon the mental faculties. In such case the unbalanced mind might receive an impulse which none could, beforehand, measure, and the individual, from having been harmless, might suddenly be converted into a most dangerous lunatic. For these reasons it would never be safe to pronounce an insane person permanently harmless, because apparently so at the time of an examination.

MENTAL CAPACITY TO MAKE A WILL.

§ 149. A question of frequent occurrence, yet in itself one of the most improper, because necessarily ambiguous, is that of asking a physician, or any subscribing witness to a will, whether a certain testator had mental capacity enough to make *a* will. The word *will* of itself means nothing, and derives all its force in law from the circumstances of the party making it, since it is an instrument having a purely conventional origin and interpretation. And the phrase *a* will, conveys no idea, in strict signification, of the mental qualifications indispensable to its validity, any more than the words oration, history, or

poem. Because a man is able to speak, it does not follow that he can make an oration; or because he can tell an incident, that he can write history; or because he can make a rhyme, that he can produce poetry. Capacity to make *a* will may imply very different and opposite states of mental power, for it may mean either the ability to make a simple bequest, as, for example, *I give my watch to A. B.*, or it may mean ability to recollect and comprehend the contents of many pages of paper, reciting, besides simple bequests, trusts of various kinds, devises over, contingent remainders, provisions to meet the possibility of issue extinct, and all that the fertile ingenuity of counsel may invent. To ask any subscribing witness or medical expert, before hearing such an instrument read, whether the testator had mental capacity enough to make *a will*, meaning *any* will, simple or complex, is asking them to answer the most ambiguous of questions. For, in contesting the probate of any will on the ground of mental incapacity, the issue is not whether the testator could have made a will in general, or any kind of a will, but whether he had capacity enough to make *the* particular will in question, and until the witnesses or experts know the character of the instrument, so as to be able to appreciate the mental capacity necessary to comprehend the purport of its provisions, it is plainly beyond their power to answer the question in whatever form it may be put. Hence, until knowledge both of the mental condition of the testator and of the contents of his will are possessed by subscribing witnesses or medical experts, it is impossible for them to express an opinion upon his capacity to make *a* will in general, and much less the particular one which forms the subject matter of dispute.

§ 150. In recapitulating the ordinary and most pregnant

sources whence difficulties of mutual comprehension between counsel and medical experts so often arise, it will be found that they spring from,

First.—The assumption on the part of counsel that experts are exclusively called in the interests of the party who summons them. This is ignoring the cardinal fact that an expert is not an ordinary witness,—does not state facts,—but, as a paradox in the law of evidence, is called for the purpose of expressing an opinion upon them, so that his testimony belongs as much to one party as to the other.

Second.—The propounding of universal propositions in contingent matters to experts, and requiring of them categorical answers applicable to particular instances. This selection of the law of analysis in preference to synthesis, excludes from the inquiry, *ab initio*, many categories which would sensibly vary the degree of resemblance between particular instances, thus translating apparent analogies into absolute homologies, and ignoring the principle, that wherever there is room for a difference, there is opportunity for an antithesis.

Third.—The failure on the part of experts to perceive the drift of their own answers to such propositions, and the inevitable self-contradictions into which they are insensibly led.

Fourth.—Both counsel and expert at times confounding the *a priori* with the *a posteriori* argument, or the *post hoc, ergo propter hoc.*

Fifth.—The use of ambiguous words in questions or answers, or appeals in the nature of the *argumentum ad hominem.*[1]

[1] Itaque mala et inepta verborum impositio miris modis intellectum obsidet. Neque definitiones aut explicationes, quibus homines docti se munire

Sixth.—Asking recondite and irrelevant questions to which it is impossible to give either definite or satisfactory answers.

Seventh.—Requiring experts to prove, to the satisfaction of laymen, the reason of opinions based exclusively upon professional experience.

It is much to be regretted that courts do not exercise a more critical scrutiny over the examination of experts, so as to save them from that inevitable antagonism into which they are placed by the party not calling them. If they could be examined by the court alone, and this would seem the most proper way, since the facts they are called upon to interpret are assumed to be admitted, the door to much casuistry and unnecessary wrangling would at once be closed. They are so little related to ordinary witnesses that this could be done without prejudice to either party, and it is in fact largely adopted in the courts of continental Europe, where the expert is treated more as an *amicus curiæ* than he is under our common law jurisdiction.

et vindicare in nonullis consueverunt, rem ullo modo restituunt. Sed verba planè vim faciunt intellectui, et omnia turbant, et homines ad inanes et innumeras controversias et commenta deducunt. Nov. Organum, Aph. XLIII.

CHAPTER IV.

STATUTORY ENACTMENTS, RELATING TO THE PRACTICE OF MEDICINE, IN FORCE IN THE STATES OF ALABAMA, ARKANSAS, CALIFORNIA, CONNECTICUT, DELAWARE, FLORIDA, GEORGIA, KENTUCKY, LOUISIANA, MAINE, MARYLAND, MASSACHUSETTS, MICHIGAN, MINNESOTA, MISSISSIPPI, NEW JERSEY, NEW YORK, OHIO, SOUTH CAROLINA, TEXAS, VERMONT, VIRGINIA, WISCONSIN, AND THE DISTRICT OF COLUMBIA.

ALABAMA—STATUTES AND RULINGS.

§ 151. No person, unless he has received a diploma from some regularly constituted medical institution in the United States, is allowed to practice physic or surgery in this State, without a license from some one of the medical boards created by act of the legislature, under a penalty of $500, to be recovered in an action of *qui tam*, one-half to go to the informer, and one-half to be paid into the treasury of the county in which such suit may be tried.

The statute of 1854, in amendment of the above, enacts, "That all regular graduates of any medical college in the United States be allowed to practice their profession without obtaining license from the medical boards or societies as established by law."[1]

By the original act, passed December 22d, 1823, none but licensed physicians are allowed to practice. Contracts for professional services with those not licensed, are void.

[1] Session Laws, 1853–4, p. 348.

Five Boards of examining physicians established. Shall meet annually on the first Monday in December, to examine applicants and grant licenses.

Two members to be a quorum.

May grant licenses to practice either medicine, or surgery, alone.

Any member may grant a permit to practice until the stated meeting.

Fees, five dollars for each diploma, and five dollars for each permit.

Board may elect officers and enact by-laws.

Members of General Assembly not eligible to board, vacancies filled by a quorum of the board, until meeting of General Assembly.

Absence for two successive annual meetings shall vacate member's place.

Law not to affect physicians already in practice.

Five hundred dollars penalty for violating the law.

Law not to apply to graduates of any medical institution in the United States.

Graduates of a medical university may exhibit diploma, and enroll their names without examination.

Penalties of law not to apply to Thompsonian physicians, *provided*, they should not bleed, blister with Spanish flies, or administer calomel or any of the mercurial preparations, antimony, arsenic, tartar-emetic, opium, or laudanum.[1]

The Alabama Medical Society was incorporated in 1841, and by its charter—

1. May adopt a constitution and by-laws.

2. May hold property, real and personal, not exceeding $60,000.

[1] Clay's Alabama Digest, 487–91, § 1–43.

3. The powers and privileges of the Board at Selma are transferred to said society, and it may grant diplomas, but not exercise banking privileges.

By the Act of January 28, 1867, all the powers and privileges of this Society are revived and reaffirmed, and its name changed from the "Alabama" to the Selma Medical Society.[1]

The Mobile Medical Society was incorporated in 1841, with powers to,

1. Adopt a constitution and by-laws.

2. To appoint five members annually to examine and license applicants.

3. To keep a record of all licenses.

Any licensed physician of Mobile may be a member by complying with its laws, unless two-thirds of the society object.

Duties of the society, *inter alia*, are to organize a Board of Health for the city, and to supervise its sanitary condition generally.

The medical boards must keep an official seal.

Shall affix seal to all licenses, such licenses to be evidence, without other proof.

Must examine and license dental surgeons.

Fifty dollars penalty for practicing dentistry without license.

Contracts to pay an unlicensed dentist, void.

Physicians, surgeons, and dentists must have their licenses recorded in the county clerk's office.

In actions for services, physicians not required to produce evidence of license, unless two days' notice has been given them that such proof will be required.

[1] Session Laws, 1866–7, p. 247.

Penalty for producing forged diploma as evidence, same as for the crime of forgery.

Under the Act of February 3, 1848, "to provide for the appointment of physician of the penitentiary," if the lessee fails to appoint for three days after the happening of a vacancy, the inspectors alone may fill the place; but if the lessee makes a nomination within such three days, which is rejected by the inspectors, he has a reasonable time after the rejection (not exceeding three days) within which to make another nomination.[1]

Previous to the passage of the Act of March 6, 1848, the physician of the penitentiary could only be removed by the inspectors, and the lessee could not avoid his liability to pay the physician's salary by refusing to admit him into the hospital.[2]

The statute of this state, prohibiting a recovery for medical services rendered by an unlicensed physician, does not prevent a recovery here for services rendered in another State; nor can its courts presume that a similar statute exists elsewhere.[3]

And, unless he practices upon the botanic system exclusively, the effect of the Acts of 1823, 1826, and 1832, is to render void all notes, bonds, or promises given, in consideration of medical services to an *unlicensed* physician.[4]

In an action on an open account for services rendered as a physician, a diploma from a medical college would be admissible evidence *if the services were rendered since the passage of the act of* 1854, *otherwise, not.*[5]

[1] Jones *v.* Graham, 24 Alab. 450.
[2] Jones *v.* Graham, 21 Alab. 654.
[3] Downs *v.* Minchew, 30 Alab. 86.
[4] Mays *v.* Williams, 27 Alab. 267.
[5] Richardson *v.* Dorman's Executor, 28 Alab. 679.

ARKANSAS—STATUTES.

§ 152. There are no statutes in this State regulating the practice of medicine, and the only references to its practitioners occur in the following acts:

Duelling and Challenges, cap. 51, part 9, art. 1 of Digest of Statutes, 1858, which forbids *surgeons* taking part in duels, under a penalty of $500, and imprisonment for not less than six months.

Confidential Communications.—"No person authorized to practice physic or surgery shall be compelled to disclose any information which he may have acquired from his patient while attending him in a professional character, and which information was necessary to enable him to prescribe as a physician, or do any act for him as a surgeon." Cap. 181, § 22, *Ibid.*

Physicians are exempted from serving on juries. Cap. 98, § 26, *Ibid.*

CALIFORNIA—STATUTES.

§ 153. After a very careful examination of the latest edition of the statutes of California, (Hittell's Edition, 1850–64, 2 vols.,) and a separate search through the Session Laws from 1850 to 1866, I have failed to find any act regulating the practice of physic or surgery in that State. And yet, in the statute of 1864, legalizing the study of anatomy, some such act appears to be referred to, for it is there recited that any physician or surgeon *duly qualified according to the laws of this State*, may have in his possession human dead bodies, etc., etc.

Under § 398 of the Practice Act, "a licensed physician or surgeon shall not, without the consent of his patient, be examined as a witness as to any information acquired in attending the patient, which was necessary to enable him to prescribe or act for the patient; provided, however, in any suit or prosecution against a physician or surgeon for malpractice, if the patient or party suing or prosecuting shall give such consent, and any such witness shall give testimony, then such physician or surgeon defendant may call any other physicians or surgeons as witnesses on behalf of defendant, without the consent of such patient or party suing or prosecuting."

CONNECTICUT—STATUTES.

§ 154. There appear to be no statutes now in force regulating the practice of physic or surgery in this State,[1] and all legal distinctions between licensed and unlicensed physicians may therefore be considered as abolished.

The following are the only special statutory clauses relating to either physicians or surgeons, viz.:

Physicians to make returns of births and deaths within first week of next calendar month thereafter, and to receive twenty-five cents for such certificate.

Penalty for disobedience, ten dollars for each offence.

Must report to board of health regarding pestilential diseases whenever so ordered by it, under a penalty of fifty dollars for each neglect or refusal.

Horse, saddle, and bridle of any practicing physician or surgeon of a value not exceeding one hundred dollars, exempt from execution.

[1] *Vide* General Statutes of Connecticut, Revision of 1866.

Surgeons, whenever employed to make post mortems, shall receive a reasonable compensation, to be paid by the State, upon certificate from the Superior Court.

Professors of anatomy to give bond, that no body used by them in dissection shall be obtained contrary to the statute forbidding disinterment of deceased persons for that purpose.

DELAWARE—STATUTES AND RULINGS.

§ 155. The Medical Society of Delaware is empowered to appoint a Board of Examiners from among its own Fellows, to grant licenses for the practice of medicine and surgery in that State, and they are required to grant such license to any person applying therefor, who shall produce a diploma from a respectable Medical College, or shall, upon full and impartial examination, be found qualified for such practice.

And by § 7, cap. 47, tit. 6, R. S. 1852, it is enacted that,

"No person who was not on the fourth day of February, 1822, a practitioner of medicine and surgery in this State, or who is not residing in and regularly admitted to practice medicine and surgery in some other State, shall practice medicine or surgery, and charge or demand any compensation therefor in this State, without having first obtained from the medical board of examiners a license as aforesaid, or a permit then in force; and every person who shall offend against this section, shall be deemed guilty of a misdemeanor, and shall, for every such offence, be fined not less than fifty, nor more than one thousand dollars. But this section shall not apply to any person

practicing medicine on the Thompsonian, or botanic system, or on the homeopathic system exclusively, and charging, demanding, or recovering compensation therefor; nor shall it be construed to prohibit any person without such license or permit from practicing medicine gratuitously, and accepting any gratuity or reward voluntarily given therefor, though no compensation for such practice can be lawfully charged, demanded, or recovered."

And under this statute it has been decided that a physician can not recover a medical bill without proving his license to practice.[1]

FLORIDA—STATUTES.

§ 156. "§ 5. Any individual desirous of practicing medicine and surgery in the State of Florida shall be enabled to do so by pursuing one of the following methods: first, he shall file in the office of the Circuit Court of the county in which he may intend to reside, a diploma from some medical college; secondly, or he shall file in the office aforesaid a certificate, signed by at least two practicing physicians residing in this State, who shall be regular graduates of some medical college; thirdly, or he shall file in the office aforesaid a certificate signed by some professor of a medical college, that he has attended one course of lectures in some one of the medical colleges aforesaid, and also a certificate from one of the physicians aforesaid.

"§ 6. Any individual failing to comply with the before-recited provisions, and attempting to practice medicine or surgery, shall, on conviction thereof, be fined in a sum

[1] Adam's Admr. *v.* Stewart, 5 Harrington, 144, 1849.

not less than fifty dollars, or more than two hundred dollars, at the discretion of the jury."[1]

In 1848, the legislature incorporated the "Medical Board of Florida," granting it among other powers that of examining and licensing applicants for the privilege of practicing medicine, but made no change in the then existing and above-recited statute, by providing "that nothing herein shall prevent any physician in this State from proceeding in the manner now directed by law for procuring a license to practice medicine."

GEORGIA—STATUTES AND RULINGS.

§ 157. The "Code of Georgia," which was adopted on the 19th December, 1860, to take effect on the 1st January, 1862, at § 1338, chap. 4 of tit. 15 of part 1st, recites as follows:

§ 1338. Any white person who has received a diploma from any medical college of the (Confederate) States,[2] without regard to the school, is authorized to practice to the extent of the powers given in said diploma, subject to the provisions hereinafter set forth.

§ 1339. There is established in this State a board of physicians of the Allopathic school, who have the authority—

1. To meet annually, or oftener, at the call of any

[1] Act Feb. 10, 1831; *vide* Thompson's Digest Laws of Florida, p. 503.

[2] On the 18th of March, 1861, a convention of the people then in session, "*Resolved*, That in the publication of the code, it should be made to conform to the Government of the Confederate States, instead of the Government of the United States." That confederation being now, *de facto*, extinct, the above limiting clause must be considered of none effect, and as though it had never existed. *Cessante causa, cessat effectus.*

three of their number, at such place in this State as a majority may select.

Thirty days notice must be given of annual meetings.

2. To elect all officers and to fill all vacancies.

3. To be a body corporate, with the right to exercise all the powers usual in such associations that are necessary to their organization, if in conformity to the constitution and laws.

4. To grant licenses to all applicants who under the law are entitled thereto, and to fix the fee therefor when not fixed by law.

5. To prescribe a course of reading to those who study medicine under private instruction, which shall be obligatory upon all who may apply to the board for examination.

§ 1340. It is their duty—

1. To grant licenses to practice, to all physicians who present their diplomas without examination.

2. To grant such licenses to all other persons who undergo a satisfactory examination.

3. To grant licenses to practice in any particular branch of medicine, or to treat any particular form of disease, if satisfied upon the examination that the applicant is thus competent.

4. To grant licenses to apothecaries, upon their standing a satisfactory examination as to their knowledge of drugs and pharmacy.

5. To keep a book in which shall be entered the names of every person licensed to practice or vend drugs, and the extent of the license.

§ 1341. One member of said board may grant a license to an applicant, who has a diploma to practice, until the next regular meeting of the board, when he shall report

the fact, at which time the temporary license is at an end, but such a license shall not be granted by a member after the board has refused one.

§ 1342. The book so ordered to be kept is a book of record, and a transcript from it, certified to by the officer who has it in keeping, under the common seal, shall be evidence in any court of this State.

§ 1343. Seven members of said board constitute a quorum for the transaction of business, and should a quorum not be present on a day appointed for its meeting, those present may adjourn from day to day until a quorum is present.

§ 1344. There is also established a board of physicians of the reformed practice of medicine, who have the same authority, and must perform the same duties, hereinbefore set forth.

§ 1345. The persons, and number of persons constituting both of said boards at the adoption of this code continue, and all the provisions of their respective charters are likewise preserved, if not lawfully altered herein.

§ 1346. Any person who shall practice surgery, or in any manner prescribe for the cure of diseases for fee or reward, in violation of the provisions of this charter, shall be liable to indictment, and, on conviction, shall be fined, not exceeding five hundred dollars for the first offence, and for the second, imprisoned not more than two months, one half of the fine to enure to the informer, the other to the educational fund of the county.

§ 1347. On the trial of such indictment, it is incumbent on the defendant to show that he has authority under the law to practice physic and surgery, to exempt himself from such penalty.

§ 1348. Neither board can license persons to practice

in a school of medicine different from their own. Physicians belonging to a school of medicine not represented by a board of physicians, may practice under their diplomas alone, and if they have none, are liable as though they had no license, and were required to have them.

§ 1349. The fee for licenses obtained on diplomas shall not exceed five dollars, and on examination shall not exceed twenty-five dollars.

§ 1350. Physicians who were in practice prior to the 24th December, 1847, are exempt from all the provisions of this charter.

§ 1351. No person in this State except a licensed physician shall vend, or expose to sale, any drugs or medicines without first obtaining a license therefor from one of said boards.

§ 1352. Any person violating the preceding section is liable to indictment, and, on conviction, to be fined not less than one thousand dollars, nor more than five thousand dollars, and for a continuation after said conviction to the like fine and imprisonment, not exceeding six months. The onus of proof is upon the defendant to show his authority.

§ 1353. Druggists are exempt from obtaining said license, who were engaged in such business prior to December 24th, 1847, and who continue so at the adoption of this code, and merchants or shopkeepers may deal in medicines already prepared, if patented, or if not patented, are legally warranted by a licensed druggist.

Malpractice.—"§ 2915. A person professing to practice surgery, or the administering of medicine for a compensation, must bring to the exercise of his profession a reasonable degree of care and skill; any injury resulting

from a want of such care and skill will be a tort, for which a recovery may be had."[1]

Legal Adjudications.—A physician who was practicing at the date of the Act of 1847, which revived the Act of 1825, to regulate the licensing of physicians in this State, is a qualified physician, and may collect his accounts for medical services.[2]

The "physician," intended by the Act of 1834, concerning commissions of lunacy, is a person who has been licensed as a physician by the board of physicians of this State.[3]

KENTUCKY—STATUTES.

§ 158. There are no statutes prescribing qualifications for the practice of medicine in this State. The field is open indiscriminately to all.

Registration of Births and Deaths.—It shall be the duty of each physician, surgeon, and midwife, to keep a registry of all births and deaths at which he, or she, shall have professionally attended, showing, in case of births, the date and place of birth, the color and sex of the child, the name, if known, whether it was born alive or dead, the residence and nativity of the parents, the name and surname of the father, and the maiden name and surname of the mother, and the occupation of the father: *Provided*, That when the child is illegitimate, the name of the supposed father shall not be given. *And provided, further*, That when two or more physicians, surgeons or midwives

[1] Revised Code of Georgia, 1861.
[2] Newson *v.* Lindsey, Admr. 21 Geo. 365.
[3] Norwood *v.* Hardy, 17 Ga. 595.

may have attended professionally at any birth, that one longest in attendance shall make the registry.

And in case of a death, showing the name, age, sex, color, condition, (*i. e.* whether single, married, or widowed,) place of birth, residence, and occupation of deceased, and the cause of death, together with the names and surnames and nativity of the parents. *And provided further*, That, when more than one physician or surgeon shall have been in attendance at the time of death, the registry shall be made by him longest in attendance.[1]

LOUISIANA—STATUTES.

§ 159. "Any person having a diploma from any chartered medical college or society in the United States, whether the same be allopathic or otherwise, shall be allowed to practice medicine, surgery, or midwifery in the State, without having to procure any further license, and may charge, demand, and receive for their visits, medicines, prescriptions, and medical services such compensation as may be established according to law."[2]

The above act, authorizing any person with a diploma from a chartered medical college in the United States, to practice medicine without a license, and to charge, demand, and receive fees for visits, etc., repealed the prohibitory and penal laws which, previous to that time, expressly prohibited every person from practicing the professions of a physician or apothecary, or that of midwifery,

[1] Supplt. to Rev. St. tit. 106, § 4.

In both the foregoing paragraphs there occur clauses relating to slaves, which now have no practical application. I have therefore omitted them from this transcript.

[2] Rev. Stat. (Ed. 1856) p. 401; Act of March 10, 1852.

without a special license granted by the medical board, or a diploma from the University of Louisiana.

MAINE—STATUTES AND RULINGS.

§ 160. No person, except a physician or surgeon, who commenced practice prior to February 16th, 1831, or has received a medical degree at a public medical institution in the United States, or a license from the censors of the Maine Medical Society, shall recover any compensation for medical or surgical services, unless previous to such services he had obtained a certificate of good moral character from the municipal officers of the town where he then resided.[1]

Under the stat. 1838, c. 53, a person who is not allowed by law to collect his dues for medical or surgical services as a regular practitioner, can not recover compensation for medical or surgical services, unless he shall have obtained a certificate of his good moral character, in manner prescribed by that statute, previously to the performance of the services. It is not sufficient that it should have been obtained prior to the commencement of the suit therefor.

Nor can such person recover payment for such services under the provisions of Rev. St. cap. 22, § 2, by having obtained a medical degree, in manner provided by that statute, after the performance of the services, and prior to the commencement of a suit to recover the same.[2]

[1] Rev. St. cap. 13, tit. 2.

[2] Thompson *v.* Hazen, 25 Maine, 104.

MARYLAND—STATUTES.

§ 161. In 1867, the legislature passed an act entitled, "An act for the protection of the public against medical imposters, and for the suppression of the crime of unlawful abortion."[1]

The first ten sections of this act prescribed qualifications for the practice of medicine, by creating a Board of medical Examiners; and requiring parties applying for licenses to practice, to be first examined by said board, and penalties were duly affixed to violations of these provisions. The remaining provisions of the act related to the procuring of abortion, with penalties, &c.

In 1868, the legislature repealed this act and substituted in its stead, so much of its provisions as related to the *crime* of abortion, prescribing penalties, &c., yet allowing "the production of abortion by a regular practitioner of medicine when, after consulting with one or more respectable physicians, he shall be satisfied that the fœtus is dead, or that no other method will secure the safety of the mother."[2]

Except this act, no restrictions are placed upon the practice of medicine, which is now open to any persons who may choose to undertake it.

MASSACHUSETTS—STATUTES.

§ 162. Since the repeal of the stat. of 1818, cap. 113, by the Rev. St. of 1835, no license is required, in order to

[1] Laws 1867, ch. 185.
[2] Laws 1868, chap. 179.

authorize any person to practice physic, or surgery, or to maintain an action for his professional services. In this latter particular, therefore, unlicensed and licensed practitioners stand upon the same footing, legally.

Mortality Returns.—"Any physician having attended a person during his last illness, shall, when requested, within fifteen days after the decease of such person, forthwith furnish, for registration, a certificate of the duration of the last sickness, of the disease of which the person died, and the date of his decease, as nearly as he can state the same. If any physician refuses or neglects to make such certificate, he shall forfeit and pay the sum of ten dollars to the use of the town in which he resides."[1]

Notice of Existence of Contagious Diseases.—"When a physician knows that any person whom he is called to visit, is infected with small-pox, or any other disease dangerous to the public health, he shall immediately give notice thereof to the selectmen or board of health of the town; and if he refuses or neglects to give such notice, he shall forfeit for each offence a sum not less than fifty, nor more than one hundred dollars."[2]

Bodies for Dissection.—"§ 1. The overseers of the poor of a town, the mayor, and aldermen of a city, and the inspectors and superintendents of a state almshouse, may, to any physician or surgeon, upon his request, give permission to take the bodies of such persons dying in such town, city or almshouse, as are required to be buried at the public expense, to be by him used within the state, for the advancement of anatomical science; preference being given to medical schools established by law, for their use in the instruction of students."

[1] Rev. St. cap. 21, § 3.
[2] R. S. cap. 26, § 48.

"§ 2. Every physician or surgeon, before receiving any such dead body, shall give to the board of officers surrendering the same to him, a sufficient bond that each body shall be used only for the promotion of anatomical science within this state; and so as, in no event, to outrage the public feeling; and that, after having been so used, the remains thereof shall be decently buried."[1]

Assistance to Coroners.—"A surgeon or chemist who aids in the examination on the determination of the coroner that such aid is necessary, shall be entitled to such compensation for his services as the coroner certifies to be just and reasonable, the same being audited and allowed in the manner provided in section fifteen."[2]

Bodies of Persons Executed may be Dissected.—"On every conviction of the crime of murder, the court may, in their discretion, order the body of the convict, after his execution, to be dissected, and the sheriff shall, in such case, deliver it to a professor of anatomy and surgery, in some college or public seminary, if requested; otherwise it shall, unless his friends desire it for interment, be delivered to any surgeon attending to receive it, who will engage for the dissection thereof."[3]

Exempted from serving as Jurors.—"Practicing physicians and surgeons regularly licensed."[4]

MICHIGAN—STATUTES.

§ 163. No distinction is made between licensed and unlicensed physicians in their right to practice medicine, and the homeopathic school is directly recognized by the

[1] R. S. cap. 27.
[2] R. S. cap. 175, § 12.
[3] R. S. cap. 160, § 8.
[4] R. S. cap. 132, § 2.

Act of 1855, relating to the University of Michigan, where it is recited, that there shall always be at least one Professor of Homeopathy in the department of medicine.

Declaration of Contagious Diseases—"Whenever any physician shall know that any person whom he is called to visit, is infected with the small-pox, or any other disease dangerous to the public health, such physician shall immediately give notice thereof to the board of health, or health officer of the township in which such diseased person may be; and every physician who shall refuse or neglect to give such notice, shall forfeit, for such offence, a sum not less than fifty, nor more than one hundred dollars."[1]

Confidential Communications.—"No person duly authorized to practice physic or surgery, shall be allowed to disclose any information which he may have acquired in attending any patient, in his professional character, and which information was necessary to enable him to prescribe for patient as a physician, or to do any act for him as a surgeon."[2]

Prescribing while Intoxicated.—"If any physician, or other person, while in a state of intoxication, shall prescribe any poison, drug or medicine, to another person, he shall be punished by imprisonment in the county jail not more than one year, or by fine, not exceeding five hundred dollars."[3]

Certificates of Death.—"Every physician, surgeon, or midwife, who shall have been in attendance upon any deceased person, shall, upon application of any supervisor, or assessor of the township, city, or any ward thereof, in which such death occurred, make out, and deliver to such

[1] R. S. cap. 37, § 45.
[2] R. S. cap. 127, § 86.
[3] R. S. cap. 186, § 4.

supervisor or assessor, a certified statement, without fee, containing the name of the disease or cause (if known) producing the death of such person; and any medical attendant who shall neglect or refuse to give such statement in relation to such death, shall, for such offence, be liable to pay a fine of not less than ten, nor more than fifty dollars, and the costs of prosecution, which fine the said supervisor or assessor is hereby required to sue for and collect in his official character."[1]

Malpractice.—"If any person professing, or holding himself out to be a physician or surgeon, shall be guilty of any malpractice, an action on the case may be maintained against such person so professing, and the rules of the common law, applicable to such actions against licensed physicians and surgeons shall be applicable to such actions on the case; and such malpractice may be given in evidence, in bar of any action for services rendered by such person so professing."[2]

MINNESOTA—STATUTES.

§ 164. By an Act of the Legislature passed March 4, 1869, the general liberty heretofore granted all persons to practice medicine, without being members of County Medical Societies, is withdrawn, in the terms following, viz.:

"SEC. 1. That it shall be unlawful for any person, within the limits of said State, who has not attended at least two full courses of instruction, and graduated at some school of medicine, within the United States, or of some foreign

[1] Laws of 1867, No. 194, § 7.

[2] Laws of 1865, No. 287; Act of March 20th.

country; or who can not produce a certificate of qualification from some State, district, or county medical society, and is not a person of a good moral character, to practice medicine in any of its departments, or perform any surgical operations for reward or compensation, or attempt to practice medicine, or prescribe medicines, or perform any surgical operation for reward or compensation, within the said State of Minnesota.

"SEC. 2. Any person living in the State of Minnesota, or any person coming into said State, who shall practice medicine, or attempt to practice medicine, in any of its departments, or perform, or attempt to perform, any surgical operation upon any person within the limits of said State, in violation of sec. 1st of this act, shall, upon conviction thereof, be fined not less than fifty dollars, nor more than one hundred dollars for such offence; or upon conviction for a second violation of this act, shall, in addition to the above fine, be imprisoned in the county jail of the county in which such offence shall have been committed, for the term of thirty days, and in no case wherein this act shall have been violated, shall any person so violating, receive a compensation for services rendered: *Provided* nothing herein contained, shall, in any way be construed to apply to any person practicing dentistry exclusively.

"SEC. 3. No person who fails or neglects, on or before the first day of October, 1869, to file, in the office of the clerk of the District Court of the county in which he resides, or keeps his office, a sworn copy of the certificate or diploma of some school or college of medicine, that he has attended at least two full courses and graduated at such school, or a sworn copy of a certificate of qualification of some state, district, or county medical society,

shall be permitted in any court of this State, to sue for, or recover any compensation for his services, advice, or attendance as a physician or surgeon; and the failure to file a sworn copy of such diploma or certificate, as above provided, shall be *prima facie* evidence that he has not attended, or graduated at any school of medicine, or received a certificate of qualification from any State, district, or county medical society.

"SEC. 4. Any person studying medicine with a preceptor, qualified as in this act above provided, shall have three years from the commencement of his term of study to comply with the provisions of this act.

"SEC. 5. This act shall take effect and be in force, from and after the first day of October, 1869."[1]

Manslaughter by Physicians.—"If any physician while in a state of intoxication shall, without a design to effect death, administer any poison, drug or medicine, or do any other act to another person, which shall produce the death of such other, he shall be deemed guilty of manslaughter in the third degree."[2]

Prescribing while Intoxicated.—"If any physician or other person, while in a state of intoxication, shall prescribe any poison, drug or medicine, to another person, he shall be punished by imprisonment in the county jail, not more than one year, or by fine not exceeding five hundred dollars."[3]

Confidential Communications.—"A regular physician or surgeon can not, without the consent of his patient, be examined in a civil action, as to any information acquired in attending the patient, which was necessary to enable him to prescribe, or act for the patient."[4]

[1] Passed March 4, 1869.
[2] R. S. cap. 89, § 19.
[3] R. S. cap. 97, § 5.
[4] R. S. cap. 84, § 53–4.

MISSISSIPPI—STATUTES.

§ 165. There are no statutes regulating the practice of physic or surgery in this State, and licensed and unlicensed practitioners stand on an equal footing.[1]

Administering Medicines while Intoxicated.—"If any physician, or other person, while in a state of intoxication, shall, without a design to effect death, administer, or cause to be administered, any poison, drug, or other medicine, or shall perform any surgical operation on another, which shall cause the death of such other, he shall be deemed guilty of manslaughter."[2]

MISSOURI—STATUTES.

The Revised Statutes, adopted March 20, 1866, having omitted all previous statutes prescribing regulations for the practice of medicine and surgery, the same may be considered as free to all persons without regard to qualifications.

Labelling Poisons.—So much of the 38th section (cap. 206) of the R. S. which makes it a penal offence to sell or deliver any poison without labelling the same, does not extend to practicing physicians delivering the same, with a prescription for the use of the article.

[1] Revised Code 1857, and Session Laws since.
[2] Revised Code 1857, § 34, art. 181.

NEW JERSEY—STATUTES.

§ 166. The "Act to incorporate Medical Societies, for the purpose of regulating the practice of physic and surgery in this State," passed Jan. 28, 1830, was, together with all its supplements, repealed by the Act of March 14, 1864, and this latter substituted for it. By this act, simply re-organizing the Medical Society of New Jersey, the section (§ 12), in the preceding statute of 1830, making it a penal offence to practice physic or surgery without a diploma from the Medical Society of the State, is entirely swept away, and the right to practice and recover for one's services as a physician granted to all persons without distinction.

NEW YORK—STATUTES AND RULINGS.

§ 167. "§ 1. The twenty-second section of chapter fourteen, Tit. seven, part first of the R. S., and all laws of this State which prohibit any person from recovering, by suit or action, any debt or demand arising from the practice of physic or surgery, or a compensation for services rendered in attending the sick, or in prescribing for the sick, are hereby repealed.[1]

"§ 2. The act entitled an Act concerning the practice of physic and surgery in this State, passed April 7, 1830, is hereby repealed.

"§ 3. No person shall be liable to any criminal prosecution, or to indictment, for practicing physic and surgery

[1] An "Act in relation to the practice of physic and surgery," passed May 6, 1844.

without license, excepting in cases of malpractice, or gross ignorance, or immoral conduct in such practice.

"§ 4. All and every person, not being a licensed physician, who shall practice, or attempt to practice physic or surgery, or who shall prescribe for, or administer medicines or specifics to, or for the sick, shall be liable for damages, in cases of malpractice, as if such person were duly licensed to practice physic or surgery.

"§ 5. Any person, not being a licensed physician, who shall practice, or profess to practice physic or surgery, or shall prescribe medicines or specifics for the sick, and shall, in any Court having cognizance thereof, be convicted of gross ignorance, malpractice, or immoral conduct, shall be deemed guilty of a misdemeanor, and liable to a fine of not less than fifty dollars, nor, not exceeding one thousand dollars, or imprisonment in the county jail not less than one month, nor exceeding twelve months, or both, in the discretion of the Court."

The above act very plainly discards all professional distinctions between licensed and unlicensed practitioners, and places them upon a common footing, except in the single case of "gross ignorance, malpractice or immoral conduct."

The "Act to incorporate Homeopathic medical societies," passed April 13, 1857, recites that they may be organized in the same manner as is provided in an act entitled "An Act to incorporate medical societies for the purpose of regulating the practice of physic and surgery in this State," passed April 10, 1813, thus placing this new system of medicine upon a legal equality with the old.

Manslaughter by Physicians.—"If any physician, while in a state of intoxication, shall, without a design to effect

death, administer any poison, drug or medicine, or do any other act to another person, which shall produce the death of such other, he shall be deemed guilty of manslaughter in the third degree.[1]

"If any physician or other person, while in a state of intoxication, shall prescribe any poison, drug or medicine to another person, which shall endanger the life of such other, he shall, upon conviction, be adjudged guilty of a misdemeanor."[2]

Of the Duties of Physicians and other persons.[3]—"It shall be the duty of each and every practicing physician in the city of New York:

"§ 10. 1. Whenever required by the Metropolitan Board of Health of said city, to report at such times, in such forms as said Board may prescribe, the number of persons attacked with any pestilential, contagious, or infectious disease, attended by such physicians for the twenty-four hours next preceding, and the number of persons attended by such physician who shall have died in said city, during the twenty-four hours next preceding such report of any such pestilential, contagious, or infectious disease.

"2. To report in writing to the (Metropolitan Board of Health) every patient he shall have, laboring under any pestilential, contagious, or infectious disease, and within twenty-four hours after he shall ascertain or suspect the nature of the disease.

[1] R. S. part 4, chap. 1, tit. 2, art. 3, § 17.

[2] R. S. (5 ed.) part 4, tit. 6, chap. 1, art. 3, § 24.

[3] The Act of February 26, 1866, creating the Metropolitan Sanitary District and Board of Health, abolished the offices of City Inspector, Commissioners of Health, and all similar ones relating to the public health in the City of New York. In whatever unrepealed statutes those names occur, therefore, the words "Metropolitan Board of Health" should be inserted in their stead, and I have substituted them accordingly.

"3. To report to the (Metropolitan Board of Health), when required, the death of any of his patients who shall have died of disease within twenty-four hours thereafter, and to state in such report the specific name and type of such disease."

"§ 27. Every practicing physician who shall refuse or neglect to perform the duties enjoined on him by the tenth section of this title, shall be considered guilty of a misdemeanor, and on conviction shall be fined for each offence, in a sum not exceeding $250, or be imprisoned for a term not exceeding six months."[1]

"§ 1. It shall be lawful, in cities whose population exceeds thirty thousand inhabitants, to deliver to the professors and teachers in medical colleges and schools in this state, and for said professors and teachers to receive the remains or body of any deceased person for the purposes of medical and surgical study; provided, that said remains shall not have been regularly interred, and shall not have been desired for interment by any relative or friend of said deceased person within twenty-four hours after death; provided, also, that the remains of no person who may be known to have relatives or friends, shall be so delivered or received, without the consent of said relatives or friends; and provided, that the remains of no one detained for debt, or as a witness, or on suspicion of crime, or of any traveler, nor of any person who shall have expressed a desire in his or her last sickness that his or her body may be interred, shall be delivered or received as aforesaid, but shall be buried in the usual manner; and provided, also, that in case the remains of any person so delivered or received, shall be subsequently claimed by any surviving relative or friend, they shall be given up to said relative or friend for interment.

[1] R. S. part 1, ch. 14, tit. 3, art. 2, § 10.

"And it shall be the duty of the said professors and teachers decently to bury, in some public cemetery, the remains of all bodies, after they shall have answered the purposes of study aforesaid; and for any neglect or violation of this provision of this act, the party so neglecting shall forfeit and pay a penalty of not less than twenty-five, nor more than fifty dollars, to be sued for by the health officers of said cities, or of other places, for the benefit of their department.

"§ 2. The remains or bodies of such persons as may be so received by the professors and teachers as aforesaid, shall be used for the purposes of medical and surgical study alone, and in this state only; and whoever shall use such remains for any other purpose, or shall remove such remains beyond the limits of this state, or in any manner traffic in the same, shall be deemed guilty of a misdemeanor, and shall, on conviction, be imprisoned for a term not exceeding one year in a county jail.

"§ 3. Every person who shall deliver up the remains of any deceased person, in violation of or contrary to any or all of the provisions contained in the first section of this act, and every person who shall receive said remains, knowing the same to have been delivered contrary to any of the provisions of said section, shall, each and every of them, be deemed guilty of a misdemeanor.

"§ 4. All laws, so far as inconsistent with this act, are hereby repealed.

"§ 5. This act shall take effect immediately."[1]

By a recent act of the Legislature of this state, passed April 28, 1869, the following restrictions are placed upon the practice of pharmacy:

"Sec. 1. No person employed or in attendance at any

[1] An Act to promote Medical Science. (Laws of 1854, chap. 123, p. 282.)

drug-store or apothecary shop shall prepare a medical prescription, unless he has served two years apprenticeship in a drug store, or is a graduate of a medical college or a college of pharmacy, except under the direct supervision of some person possessing some one of the before-mentioned qualifications; nor shall any one having permanent charge as proprietor, or otherwise, in any store at which drugs are sold by retail, or at which medical prescriptions are put up for sale or use, permit the putting up or preparation thereof therein by any person, unless such person has served two years as apprentice in a retail drug store, or is a graduate of a medical college or a college of pharmacy.

"SEC. 2. Any person violating the provisions of this act shall be deemed guilty of a misdemeanor, and shall be punished by a fine not exceeding $100, or by imprisonment not to exceed six months in the county jail; and in case of death ensuing from such violations, the person offending shall be deemed guilty of a felony, and be punished by a fine not less than $1,000, nor more than $5,000, or by imprisonment in the state prison for a term of not less than two years, nor more than four years, or by both fine and imprisonment in the discretion of the court.

"SEC. 3. This act shall take effect immediately."

Legal Adjudications.—Under a contract authorizing one party to appoint a "doctor," all that he is required to do is to appoint a person who makes it his business to practice physic, and it is immaterial to what school of medicine the person so selected belonged, or whether he belonged to any.[1]

Powers of Medical Societies.—A medical society may

[1] Corsi *v.* Maretzek, 4 E. D. Smith, 1.

refuse to admit an applicant on the ground of unfitness, or unprofessional practice.[1]

An initiation fee may be demanded from physicians and surgeons on becoming members of county medical societies.[2]

OHIO—STATUTES.

§ 168. "*An act to protect the citizens of Ohio from empiricism, and to elevate the standing of the medical profession.* SECTION 1. Be it enacted by the General Assembly of the State of Ohio, that it shall be unlawful for any person within the limits of said state, who has not attended two full courses of instruction, and graduated at some school of medicine, either of the United States or some foreign country, or, who cannot produce a certificate of qualification from some state or county medical society, and is not a person of good moral character, to practice medicine in any of its departments for reward or compensation, or attempt to practice medicine, or prescribe medicine, or medicines, for reward or compensation for any sick person within the said state of Ohio; *provided*, that in all cases when any person has been continually engaged in the practice of medicine for a period of ten years or more, he shall be considered to have complied with the provisions of this act; and that where persons have been in the continuous practice of medicine for five years or more, they shall be allowed two years to comply with such provisions.

[1] Ex parte Paine, 1 Hill, 665; *per contra*, vid. Bartlett *v.* Med. Soc., 32 N. Y. 187.

[2] People ex rel. Dunnel *v.* Med. Soc. county of N. Y., 3 Wend. 427.

"SECTION 2. Any person living in the state of Ohio, or any person coming into said state, who shall practice medicine, or attempt to practice medicine in any of its departments, or perform, or attempt to perform any surgical operations upon any person within the limits of said state, in violation of section 1st of this act, shall, upon conviction thereof, be fined not less than fifty, nor more than one hundred dollars for such offence; and upon conviction for a second violation of this act, shall, in addition to the above fine, be imprisoned in the county jail, in the county in which said offence shall have been committed, for the term of thirty days; and in no case wherein this act shall have been violated, shall any person so violating, receive a compensation for services rendered, *provided*, that nothing herein contained shall in any way be construed to apply to any person practicing dentistry.

"SECTION 3. This act shall take effect and be in force on and after the first day of October, 1868."[1]

OTHER STATUTES.—*Administering Medicine to procure Abortion.*—"§ 1. That any physician, or other person, who shall willfully administer to any pregnant woman any medicine, drug, substance or thing whatever, or shall use any instrument, or other means whatever, with intent thereby to procure the miscarriage of any such woman, unless the same shall have been necessary to preserve the life of such woman, or shall have been advised by two physicians to be necessary for that purpose, shall, upon conviction, be punished by imprisonment in the county jail, not more than one year, or by fine, not exceeding five hundred dollars, or by both such fine and imprisonment.

"§ 2. That any physician, or other person, who shall

[1] Passed May 5, 1868.—Laws of Ohio, Vol. 65, (1868,) p. 146.

administer to any woman, pregnant with a quick child, any medicine, drug, or substance whatever, or shall use or employ any instrument or other means, with intent thereby to destroy such child, unless the same shall have been necessary to preserve the life of such mother, or shall have been advised by two physicians to be necessary for such purpose, shall, in the case of the death of such child, or mother, in consequence thereof, be deemed guilty of a high misdemeanor, and, upon conviction thereof, shall be imprisoned in the penitentiary not more than seven years, nor less than one year."

Prescribing while Intoxicated.—"§ 3. That if any physician, or other person, while in a state of intoxication, shall prescribe any poison, drug, or medicine, to another person, which shall endanger the life of such other person, he shall, upon conviction, be adjudged guilty of a misdemeanor, and shall be punished by a fine, (of) not more than one hundred dollars.

"§ 4. That if any physician, or other person, shall prescribe any drug or medicine to another person, the true nature and composition of which, he does not, if inquired of, truly make known, but avows the same a secret medicine, or composition, thereby endangering the life of such other person, he shall, upon conviction, be adjudged guilty of a misdemeanor, and be fined any sum not exceeding one hundred dollars."[1]

Horse and saddle and bridle; also medicines, instruments and books, not exceeding fifty dollars in value, belonging to a practicing physician, are exempt from execution.[2]

[1] R. S. cap. 3, sections 162–3–4–5.
[2] R. S. cap. 87, sect. 644.

SOUTH CAROLINA—STATUTES.

§ 169. The act of December 8th, 1817, entitled, "An Act to regulate the licensing of physicians to practice, &c.," not having been repealed, is still in force. The clauses of essential importance to physicians are the following:

"1. That from, and after the passing of this act, no person, or persons, shall be allowed to practice physic or surgery, or any of the branches thereof, or in any case to prescribe for the cure of diseases, for fee, or reward, unless he or they shall have been first licensed to do so, in the manner hereinafter prescribed.

"2. That if any person or persons shall hereafter presume, without such license, to practice physic, surgery, or in any manner prescribe for the cure of disease, for fee or reward, he or they shall be liable to be indicted, and, on conviction, shall be fined, not exceeding the sum of five hundred dollars, and be imprisoned, not exceeding the term of two months; one half of the fine to the use of him who shall inform, and the other half to the use of the state.

"3. That on the trial of all indictments for any of the offences enumerated in this act, it shall be incumbent on the defendant to show that he has been licensed to practice physic and surgery, and to prescribe for the cure of disease, in the manner hereinafter mentioned, to exempt himself from the penalties enumerated in this act."

(The above section has been repealed.)

"4. That all bonds, notes, promises and assumptions, made to any person or persons not licensed in manner hereinafter mentioned, the consideration for which shall

be services rendered as a physician or surgeon, in prescribing for the cure of diseases, shall be, and they are hereby declared, utterly void and of no effect.

"5. That, in order to the proper regulation of the practice of physic and surgery, there shall be established two boards of physicians, one at Charleston, and the other at Columbia, who shall, at their annual meetings, examine all applicants, and if, on such examination, they are found competent, shall grant to such applicants a license to practice physic and surgery. *Provided*, that three members of either of the said boards shall constitute a quorum to make such examination and grant such license. *And provided also*, that if any applicant shall have studied and received a diploma from any medical college, the said board or boards, or a quorum of either of them, shall license the said applicant to practice, without examination. *And provided also*, that no person shall be so licensed, unless he shall prove to the satisfaction of the board that he has studied medicine and surgery under the direction of some regular practicing physician for at least two years."

"12. That the medical society of Charleston, or any three members of the board of physicians at Columbia, be, and they are hereby authorized, during the recess of the annual boards, to examine any applicants, and if, on examination, deemed competent to practice medicine and surgery, shall grant them permission to practice until the next annual meeting of the board of physicians at Charleston or Columbia, to whom they shall make application for a license to practice medicine and surgery, and if refused, shall not be again permitted to practice except by a license from one of the boards."

Sections 2, 3 and 9 (relating to apothecaries) repealed,

"so far as regards the pains and penalties imposed" by the Act of December 19, 1838.

By the Act of December 20, 1828, it is enacted that neither of the medical Boards shall grant a license to practice physic or surgery to any person who shall apply for the same, unless he have a diploma from some medical institution, or pass an examination by the Faculty of the Medical College of Charleston.

By the Act of December 19, 1833, it is enacted that "the Trustees and Faculty of the Medical College of the State of South Carolina, are hereby authorized and empowered to grant a license to practice medicine and surgery to any person who, upon applying for the same, shall present a diploma from some medical institution, or who, upon examination by the said Faculty, shall obtain from them a certificate or recommendation that the said applicant is duly qualified to practice medicine and surgery."

Post Mortem Examinations.—By the Act of December 16, 1851, it is enacted, "That the following compensation shall thereafter be allowed to any physician who may be called in by the acting coroner, to make a post mortem examination, to wit:

"Where death has resulted from external violence, and where no dissection is required, the sum of ten dollars.

"Where dissection is necessary, and no interment has taken place, twenty dollars; for the same after one or more days interment, thirty dollars; for the same when any chemical analysis is required, a sum not exceeding fifty dollars, together with the expense of such analysis. And that in every case in which a physician shall be called to any distance beyond one mile, he shall be allowed the mileage usually charged in his neighborhood, *provided*, that in all cases in which chemical analysis shall be made,

the physician who shall make the post mortem examination shall furnish to the legislature, with his account, a full statement of such analysis. *And provided,* every account presented for services for any post mortem examination shall have the certificate of the coroner, or magistrate acting as coroner, that the services were rendered."

TEXAS—STATUTES.

§ 170. Since the act of 1848, abolishing the board of medical censors, no qualifications are required for the practice of medicine. Physicians are only recognized as a class, as being exempt from jury duty.

VERMONT—STATUTES.

§ 171. The Act of October 22, 1838, repealing the statute of November, 1820, having abolished all qualifications for the practice of medicine, licensed and unlicensed practitioners are now placed upon a similar footing.

By the Act of December 5, 1853, for the advancement of medicine and surgery, it is recited that—

1. Any surgeon or physician may have a dead human subject in his possession, if obtained without violation of law.

2. In case of a criminal executed, any Medical school or surgeon may have the body who shall apply for it, provided no relative objects.

3. If any person bequeaths his body for purposes of dissection, it shall be so disposed of, provided no relative objects.

By the Act of November 13, 1858, the legislature incorporated the Vermont Homeopathic Medical Society.

By the Act of November 9, 1866, the legislature incorporated the Vermont State Eclectic Medical Society.

Every physician who shall have been in attendance upon any deceased person shall leave with the town clerk a certificate containing the name of the disease, or cause (if known) of such death, within fifteen days after the interment of the deceased. Any such medical attendant who shall neglect, or refuse to give the certificate required by this section, shall for such offence, pay a fine of three dollars for the use of the town where such offence shall be committed.[1]

VIRGINIA.

§ 172. By the code of 1860, no qualifications are required for the practice of medicine, except a *county license* where the practitioner resides. The tax on the same is five dollars.[2]

Every physician and surgeon shall, in a book to be kept by him, make a record at once of the death of every person dying in this State, upon whom he has attended at the time of such death, setting out as far as practicable the circumstances herein required to be recorded, by a commissioner respecting deaths. He shall give to a commissioner of the revenue, whenever called on by him for that purpose, annually, a copy of such record, so far as the same relates to deaths in such commissioner's district.[3]

[1] R. S. tit. 10, chap. 18, § 7.
[2] *Vide* Code, pp. 225–7, 248.
[3] Code, tit. 31, chap. 108, § 31.

WISCONSIN—STATUTES.

§ 173. By the R. S. chap. 33, County medical societies are established, with authority to examine candidates for membership and diplomas, and the same privilege is granted to the State medical society; but the value of any such act was entirely neutralized by section 14, which says that "This chapter shall not be so construed as to prevent any person from practicing physic and surgery within this State, who is not a member of any of said societies."

But, by chap. 95 of the laws of 1867, it was enacted as follows:

"Section 1st. Section 14 of Chap. 33d of the R. S., entitled 'Of Medical Societies,' is hereby amended by adding thereto as follows: 'but no person practicing physic and surgery shall have the right to collect, in any action, in any court in this State, fees for the performance of medical services, nor to testify in a professional capacity as a physician and surgeon in any case, unless such person shall have received a diploma from some incorporated medical society, or college, or shall be a member of the State or some county medical society legally organized in this State.'"[1]

And still later, by chap. 71 of the laws of 1868, it was enacted as follows:

"Section 1st. Section 1 of chap. 95 of the General Laws of 1867, entitled 'Of Medical Societies,' is hereby amended by adding thereto as follows: 'And that, if any practicing physician or surgeon shall write, or cause to be written, any prescription or recipe in any characters,

[1] Passed April 8, 1867.

figures, or cypher, other than in the English or Latin languages generally in use among medical practitioners, he or she shall be deemed guilty of a misdemeanor, and shall be punishable for every such offence by a fine of a sum not exceeding twenty-five dollars, and not less than five dollars.'"[1]

DISTRICT OF COLUMBIA.

§ 174. The medical society of the District may elect a Board of Examiners, whose duty it shall be to grant licenses to such persons as they may, upon a full examination, judge adequate to commence the practice of the medical or chirurgical arts, or as may produce diplomas from some respectable college or society. Each person obtaining a certificate to pay not exceeding ten dollars.

After the appointment of the aforesaid medical Board, no person not heretofore a practitioner of medicine or surgery within the District, shall be allowed to practice within the same, and receive payment for his services, without first having obtained a license testified as by this law is directed, or without the production of a diploma as aforesaid, under the penalty of fifty dollars for each offence, to be recovered in the county court where he may reside, by bill of presentment and indictment; one-half for the use of the society, and the other for that of the informer:

Provided, That nothing herein contained shall extend, or be construed to extend, to prohibit any person during his actual residence in any of the United States, and who, by the laws of the State wherein he doth or may reside,

[1] Passed March 4, 1868.

is not prohibited from practicing in either of the above branches (physic or surgery), from practicing in this district:

Provided, that it shall and may be lawful for any person, resident as aforesaid, and not prohibited as aforesaid, when specially sent for, to come into any part of the District and administer or prescribe medicine, or perform any operation for the relief of such to whose assistance he may be sent for.[1]

[1] Act passed February 16, 1819; *vide* U. S. Statutes, vol. 6, p. 221.

PART THIRD.

THE ETHICS OF MEDICINE.

CHAPTER I.

THE HIPPOCRATIC OATH.

I SWEAR by Apollo the physician, and Æsculapius and Hygeia and Panacea, and all the gods and goddesses, that, according to my ability and judgment I will keep this oath and this stipulation, to reckon him who taught me this art equally dear to me as my parents, to share my substance with him, and relieve his necessities, if required; to look upon his offspring in the same footing as my own brothers, and to teach them this art, if they shall wish to learn it, without fee or stipulation; and that by precept, lecture, and every other mode of instruction, I will impart a knowledge of the art to my own sons, and those of my teachers, and to disciples bound by a stipulation and oath according to the law of medicine, but to none others. I will follow that system of regimen which, according to my ability and judgment, I consider for the benefit of my patients and abstain from whatever is deleterious and mischievous. I will give no deadly medicine to any one if asked, nor suggest any such counsel; and in like manner I will not give to a woman a pessary to produce abortion.

With purity and with holiness I will pass my life, and practice my art. I will not cut persons laboring under the stone, but will leave this to be done by men who are practitioners of this work. Into whatever houses I enter, I will go into them for the benefit of the sick, and will abstain from every voluntary act of mischief and corruption; and further, from the seduction of females, or males, of freemen and slaves. Whatever, in connection with my professional practice, or not in connection with it, I see, or hear, in the life of men, which ought not to be spoken of abroad, I will not divulge, as reckoning that all such should be kept secret. While I continue to keep this oath unviolated, may it be granted to me to enjoy life, and the practice of the art, respected by all men, in all times. But should I trespass and violate this oath, may the reverse be my lot.

CHAPTER II.

CODE OF ETHICS OF THE AMERICAN MEDICAL ASSOCIATION.

Duties of Physicians to their Patients.—§ 1. A physician should not only be ever ready to obey the calls of the sick, but his mind ought also to be imbued with the greatness of his mission, and the responsibility he habitually incurs in its discharge. Those obligations are the more deep and enduring, because there is no tribunal other than his own conscience to adjudge penalties for carelessness or neglect. Physicians should, therefore, minister to the sick with due impressions of the importance of their office; reflecting that the ease, the health, and the lives of those committed to their charge, depend on their skill, attention and fidelity. They should study, also, in their deportment, so to unite *tenderness* with *firmness* and *condescension* with *authority*, as to inspire the minds of their patients with gratitude, respect, and confidence.

§ 2. Every case committed to the charge of a physician should be treated with attention, steadiness and humanity. Reasonable indulgence should be granted to the mental imbecility and caprices of the sick. Secrecy and delicacy, when required by peculiar circumstances, should be strictly observed; and the familiar and confidential intercourse to which physicians are admitted in their professional visits, should be used with discretion, and with the most scrupulous regard to fidelity and honor. The obligation of secrecy extends beyond the period of profes-

sional services;—none of the privacies of personal and domestic life, no infirmity of disposition or flaw of character observed during professional attendance, should ever be divulged by the physician, except when he is imperatively required to do so. The force and necessity of this obligation are indeed so great, that professional men have, under certain circumstances, been protected in their observance of secrecy by courts of justice.

§ 3. Frequent visits to the sick are, in general, requisite, since they enable the physician to arrive at a more perfect knowledge of the disease—to meet promptly every change which may occur, and also tend to preserve the confidence of the patient. But unnecessary visits are to be avoided, as they give useless anxiety to the patient, tend to diminish the authority of the physician, and render him liable to be suspected of interested motives.

§ 4. A physician should not be forward to make gloomy prognostications, because they savor of empiricism, by magnifying the importance of his services in the treatment or cure of the disease. But he should not fail, on proper occasions, to give to the friends of the patient timely notice of danger when it really occurs; and even to the patient himself, if absolutely necessary. This office, however, is so peculiarly alarming when executed by him, that it ought to be declined whenever it can be assigned to any other person of sufficient judgment and delicacy. For, the physician should be the minister of hope and comfort to the sick; that, by such cordials to the drooping spirit, he may smooth the bed of death, revive expiring life, and counteract the depressing influence of those maladies which often disturb the tranquility of the most resigned, in their last moments. The life of a sick person can be shortened not only by the acts, but also by the

words or the manner of the physician. It is, therefore, a sacred duty to guard himself carefully in this respect, and avoid all things which have a tendency to discourage the patient and to depress his spirits.

§ 5. A physician ought not to abandon a patient because the case is deemed incurable; for his attendance may continue to be highly useful to the patient, and comforting to the relatives around him, even in the last period of a fatal malady, by alleviating pain and other symptoms, and by soothing mental anguish. To decline attendance, under such circumstances, would be sacrificing to fanciful delicacy and mistaken liberality, that moral duty, which is independent of, and far superior to, all pecuniary consideration.

§ 6. Consultations should be promoted in difficult or protracted cases, as they give rise to confidence, energy, and more enlarged views in practice.

§ 7. The opportunity which a physician not unfrequently enjoys of promoting and strengthening the good resolutions of his patients suffering under the consequences of vicious conduct, ought never to be neglected. His counsels, or even his remonstrances will give satisfaction, not offence, if they be proffered with politeness, and evince a genuine love of virtue, accompanied by a sincere interest in the welfare of the person to whom they are addressed.

Obligations of Patients to their Physicians.—§ 1. The members of the medical profession, upon whom is enjoined the performance of so many important and arduous duties towards the community, and who are required to make so many sacrifices of comfort, ease, and health, for the welfare of those who avail themselves of their services, certainly have a right to expect and require, that their patients should entertain a just sense of the duties which they owe to their medical attendants.

§ 2. The first duty of a patient is, to select as his medical adviser one who has received a regular professional education. In no trade or occupation, do mankind rely on the skill of an untaught artist; and in medicine, confessedly the most difficult and intricate of the sciences, the world ought not to suppose that knowledge is intuitive.

§ 3. Patients should prefer a physician whose habits of life are regular, and who is not devoted to company, pleasure, or to any pursuit incompatible with his professional obligations. A patient should, also, confide the care of himself and family, as much as possible, to one physician; for a medical man who has become acquainted with the peculiarities of constitution, habits, and predispositions of those he attends, is more likely to be successful in his treatment, than one who does not possess that knowledge.

A patient who has thus selected his physician, should always apply for advice in what may appear to him trivial cases, for the most fatal results often supervene on the slightest accidents. It is of still more importance that he should apply for assistance in the forming stage of violent diseases; it is to a neglect of this precept that medicine owes much of the uncertainty and imperfection with which it has been reproached.

§ 4. Patients should faithfully and unreservedly communicate to their physician the supposed cause of their disease. This is the more important, as many diseases of a mental origin simulate those depending on external causes, and are only to be cured by ministering to the mind diseased. A patient should never be afraid of thus making his physician his friend and adviser; he should always bear in mind that a medical man is under the strongest obligations of secrecy. Even the female sex

should never allow feelings of shame or delicacy to prevent their disclosing the seat, symptoms, and causes of complaints peculiar to them. However commendable a modest reserve may be in the common occurrences of life, its strictest observance in medicine is often attended with the most serious consequences, and a patient may sink under a painful and loathsome disease, which might have been readily prevented had timely intimation been given to the physician.

§ 5. A patient should never weary his physician with a tedious detail of events or matters not appertaining to his disease. Even as relates to his actual symptoms, he will convey much more real information by giving clear answers to interrogatories, than by the most minute account of his own framing. Neither should he obtrude on his physician the details of his business, nor the history of his family concerns.

§ 6. The obedience of a patient to the prescriptions of his physicians should be prompt and implicit. He should never permit his own crude opinions as to their fitness, to influence his attention to them. A failure in one particular may render an otherwise judicious treatment dangerous, and even fatal. This remark is equally applicable to diet, drink, and exercise. As patients become convalescent, they are very apt to suppose that the rules prescribed for them may be disregarded, and the consequence, but too often, is a relapse. Patients should never allow themselves to be persuaded to take any medicine, whatever, that may be recommended to them by the self-constituted doctors and doctresses, who are so frequently met with, and who pretend to possess infallible remedies for the cure of every disease. However simple some of their prescriptions may appear to be, it often happens that they are

productive of much mischief, and in all cases they are injurious by contravening the plan of treatment adopted by the physician.

§ 7. The patient should, if possible, avoid even the *friendly visits of a physician* who is not attending him—and when he does receive them, he should never converse on the subject of his disease, as an observation may be made, without any intention of interference, which may destroy his confidence in the course he is pursuing, and induce him to neglect the directions prescribed to him. A patient should never send for a consulting physician without the express consent of his own medical attendant. It is of great importance that physicians should act in concert; for, although their modes of treatment may be attended with equal success when employed singly, yet, conjointly, they are very likely to be productive of disastrous results.

§ 8. When a patient wishes to dismiss his physician, justice and common courtesy require that he should declare his reasons for so doing.

§ 9. Patients should always, when practicable, send for their physician in the morning, before his usual hour of going out; for, by being early aware of the visits he has to pay during the day, the physician is able to apportion his time in such a manner as to prevent an interference of engagements. Patients should also avoid calling on their medical adviser unnecessarily during the hours devoted to meals or sleep. They should always be in readiness to receive the visits of their physician, as the detention of a few minutes is often of serious inconvenience to him.

§ 10. A patient should, after his recovery, entertain a just and enduring sense of the value of the services rendered him by his physician; for these are of such a char-

acter, that no mere pecuniary acknowledgment can repay or cancel them.

Of the duties of Physicians to each other, and to the Profession at large.—§ 1. Every individual, on entering the profession, as he becomes thereby entitled to all its privileges and immunities, incurs an obligation to exert his best abilities to maintain its dignity and honor, to exalt its standing, and to extend the bounds of its usefulness. He should, therefore, observe strictly, such laws as are instituted for the government of its members;—should avoid all contumelious and sarcastic remarks relative to the faculty, as a body; and while, by unwearied diligence, he resorts to every honorable means of enriching the science, he should entertain a due respect for his seniors, who have, by their labors, brought it to the elevated condition in which he finds it.

§ 2. There is no profession, from the members of which greater purity of character, and a higher standard of moral excellence are required, than the medical; and to attain such eminence, is a duty every physician owes alike to his profession and to his patients. It is due to the latter, as without it he cannot command their respect and confidence, and to both, because no scientific attainments can compensate for the want of correct moral principles. It is also incumbent upon the faculty to be temperate in all things, for the practice of physic requires the unremitting exercise of a clear and vigorous understanding; and on emergencies, for which no professional man should be unprepared, a steady hand, an acute eye, and an unclouded head may be essential to the well-being, and even to the life, of a fellow-creature.

§ 3. It is derogatory to the dignity of the profession to resort to public advertisements, or private cards, or hand-

bills, inviting the attention of individuals affected with particular diseases—publicly offering advice and medicine to the poor gratis, or promising radical cures; or to publish cases and operations in the daily prints, or suffer such publications to be made; to invite laymen to be present at operations, to boast of cures and remedies, to adduce certificates of skill and success, or to perform any other similar acts. These are the ordinary practices of empirics, and are highly reprehensible in a regular physician.

§ 4. Equally derogatory to professional character is it, for a physician to hold a patent for any surgical instrument or medicine; or to dispense a secret *nostrum*, whether it be the composition or exclusive property of himself or of others. For, if such nostrum be of real efficacy, any concealment regarding it is inconsistent with beneficence and professional liberality; and, if mystery alone give it value and importance, such craft implies either disgraceful ignorance, or fraudulent avarice. It is also reprehensible for physicians to give certificates attesting the efficacy of patent or secret medicines, or in any way to promote the use of them.

Professional services of Physicians to each other.—§ 1. All practitioners of medicine, their wives, and their children while under the paternal care, are entitled to the gratuitous services of any one or more of the faculty residing near them, whose assistance may be desired. A physician afflicted with disease is usually an incompetent judge of his own case; and the natural anxiety and solicitude which he experiences at the sickness of a wife, a child, or any one who, by the ties of consanguinity, is rendered peculiarly dear to him, tend to obscure his judgment, and produce timidity and irresolution in his practice. Under such circumstances, medical

men are peculiarly dependent upon each other, and kind offices and professional aid should always be cheerfully and gratuitously afforded. Visits ought not, however, to be obtruded officiously; as such unasked civility may give rise to embarrassment, or interfere with that choice on which confidence depends. But, if a distant member of the faculty, whose circumstances are affluent, request attendance, and an honorarium be offered, it should not be declined; for no pecuniary obligation ought to be imposed, which the party receiving it would wish not to incur.

Of the Duties of Physicians as respects vicarious offices.—§ 1. The affairs of life, the pursuit of health, and the various accidents and contingencies to which a medical man is peculiarly exposed, sometimes require him temporarily to withdraw from his duties to his patients, and to request some of his professional brethren to officiate for him. Compliance with this request is an act of courtesy, which should always be performed with the utmost consideration for the interest and character of the family physician, and when exercised for a short period, all the pecuniary obligations for such service should be awarded to him. But if a member of the profession neglect his business in quest of pleasure and amusement, he can not be considered as entitled to the advantages of the frequent and long-continued exercise of this fraternal courtesy, without awarding to the physician who officiates the fees arising from the discharge of his professional duties.

In obstetrical and important surgical cases, which give rise to unusual fatigue, anxiety, and responsibility, it is just that the fees accruing therefrom should be awarded to the physician who officiates.

Of the Duties of Physicians in regard to consultations.—§ 1. A regular medical education furnishes the only presumptive evidence of professional abilities and acquirements, and ought to be the only acknowledged right of an individual to the exercise and honors of his profession. Nevertheless, as in consultations the good of the patient is the sole object in view, and this is often dependent on personal confidence, no intelligent regular practitioner, who has a license to practice from some medical board of known and acknowledged respectability, recognized by this association, and who is in good moral and professional standing in the place in which he resides, should be fastidiously excluded from fellowship, or his aid refused in consultation, when it is requested by the patient. But no one can be considered as a regular practitioner or a fit associate in consultation, whose practice is based on an exclusive dogma, to the rejection of the accumulated experience of the profession, and of the aids actually furnished by anatomy, physiology, pathology, and organic chemistry.

§ 2. In consultations, no rivalship or jealousy should be indulged; candor, probity, and all due respect should be exercised towards the physician having charge of the case.

§ 3. In consultations, the attending physician should be the first to propose the necessary questions to the sick; after which the consulting physician should have the opportunity to make such farther inquiries of the patient as may be necessary to satisfy him of the true character of the case. Both physicians should then retire to a private place for deliberation; and the one first in attendance should communicate the directions agreed upon to the patient or his friends, as well as any opinions

which it may be thought proper to express. But no statement or discussion of it should take place before the patient or his friends, except in the presence of all the faculty attending, and by their common consent; and no *opinions* or *prognostications* should be delivered, which are not the result of previous deliberation and concurrence.

§ 4. In consultations, the physician in attendance should deliver his opinion first; and when there are several consulting, they should deliver their opinions in the order in which they have been called in. No decision, however, should restrain the attending physician from making such variations in the mode of treatment, as any subsequent unexpected change in the character of the case may demand. But such variation, and the reasons for it, ought to be carefully detailed at the next meeting in consultation. The same privilege belongs also to the consulting physician if he is sent for in an emergency, when the regular attendant is out of the way, and similar explanations must be made by him at the next consultation.

§ 5. The utmost punctuality should be observed in the visits of physicians when they are to hold consultations together, and this is generally practicable, for society has been considerate enough to allow the plea of a professional engagement to take precedence of all others, and to be an ample reason for the relinquishment of any present occupation. But, as professional engagements may sometimes interfere, and delay one of the parties, the physician who first arrives should wait for his associate a reasonable period, after which the consultation should be considered as postponed to a new appointment. If it be the attending physician who is present, he will of course see the patient and prescribe; but if it be the consulting

one, he should retire, except in case of emergency, or when he has been called from a considerable distance, in which latter case he may examine the patient, and give his opinion in *writing*, and *under seal*, to be delivered to his associate.

§ 6. In consultations, theoretical discussions should be avoided, as occasioning perplexity and loss of time. For there may be much diversity of opinion concerning speculative points, with perfect agreement in those modes of practice which are founded, not on hypothesis, but on experience and observation.

§ 7. All discussions in consultation should be held as secret and confidential. Neither by words nor manner should any of the parties to a consultation assert or insinuate, that any part of the treatment pursued did not receive his assent. The responsibility must be equally divided between the medical attendants—they must equally share the credit of success as well as the blame of failure.

§ 8. Should an irreconcilable diversity of opinion occur when several physicians are called upon to consult together, the opinion of the majority should be considered as decisive; but if the numbers be equal on each side, then the decision should rest with the attending physician. It may, moreover, sometimes happen, that two physicians can not agree in their views of the nature of a case, and the treatment to be pursued. This is a circumstance much to be deplored, and should always be avoided, if possible, by mutual concessions, as far as they can be justified by a conscientious regard for the dictates of judgment. But, in the event of its occurrence, a third physician should, if practicable, be called to act as umpire; and if circumstances prevent the adoption of this course,

it must be left to the patient to elect the physician in whom he is most willing to confide. But, as every physician relies upon the rectitude of his judgment, he should, when left in the minority, politely and consistently retire from any farther deliberation in the consultation, or participation in the management of the case.

§ 9. As circumstances sometimes occur to render a *special consultation* desirable, when the continued attendance of two physicians might be objectionable to the patient, the member of the faculty whose assistance is required in such cases, should sedulously guard against all future unsolicited attendance. As such consultations require an extraordinary portion of both time and attention, at least a double honorarium may be reasonably expected.

§ 10. A physician who is called upon to consult, should observe the most honorable and scrupulous regard for the character and standing of the practitioner in attendance; the practice of the latter, if necessary, should be justified as far as it can be, consistently with a conscientious regard for truth, and no hint or insinuation should be thrown out which could impair the confidence reposed in him, or affect his reputation. The consulting physician should also carefully refrain from any of those extraordinary attentions or assiduities, which are too often practiced by the dishonest for the base purpose of gaining applause, or ingratiating themselves into the favor of families and individuals.

Duties of Physicians in cases of interference.—§ 1. Medicine is a liberal profession, and those admitted into its ranks should found their expectations of practice upon the extent of their qualifications, not on intrigue or artifice.

§ 2. A physician, in his intercourse with a patient under the care of another practitioner, should observe the strictest caution and reserve. No meddling inquiries should be made—no disingenuous hints given relative to the nature and treatment of his disorder; nor any course of conduct pursued that may directly or indirectly tend to diminish the trust reposed in the physician employed.

§ 3. The same circumspection and reserve should be observed when, from motives of business or friendship, a physician is prompted to visit an individual who is under the direction of another practitioner. Indeed, such visits should be avoided, except under peculiar circumstances; and when they are made, no particular inquiries should be instituted relative to the nature of the disease, or the remedies employed, but the topics of the conversation should be as foreign to the case as circumstances will admit.

§ 4. A physician ought not to take charge of or prescribe for a patient who has been recently under the care of another member of the faculty in the same illness, except in cases of sudden emergency, or in consultation with the physician previously in attendance, or when the latter has relinquished the case, or been regularly notified that his services are no longer desired. Under such circumstances no unjust and illiberal insinuations should be thrown out in relation to the conduct or practice previously pursued, which should be justified as far as candor and regard for truth and probity will permit; for it often happens that patients become dissatisfied when they do not experience immediate relief, and, as many diseases are naturally protracted, the want of success, in the first stage of treatment, affords no evidence of a lack of professional knowledge and skill.

§ 5. When a physician is called to an urgent case, because the family attendant is not at hand, he ought, unless his assistance in consultation be desired, to resign the care of the patient to the latter immediately on his arrival.

§ 6. It often happens, in cases of sudden illness, or of recent accidents and injuries, owing to the alarm and anxiety of friends, that a number of physicians are simultaneously sent for. Under these circumstances, courtesy should assign the patient to the first who arrives, who should select from those present any additional assistance that he may deem necessary. In all such cases, however, the practitioner who officiates should request the family physician, if there be one, to be called, and, unless his farther attendance be requested, should resign the case to the latter on his arrival.

§ 7. When a physician is called to the patient of another practitioner, in consequence of the sickness or absence of the latter, he ought, on the return or recovery of the regular attendant, and with the consent of the patient, to surrender the case.[1]

§ 8. A physician, when visiting a sick person in the country, may be desired to see a neighboring patient who is under the regular direction of another physician, in consequence of some sudden change or aggravation of symptoms. The conduct to be pursued on such an occasion is to give advice adapted to present circumstances; to interfere no farther than is absolutely necessary with

[1] The expression "Patient of another Practitioner" is understood to mean a patient who may have been under the charge of another practitioner at the time of the attack of sickness, or departure from home of the latter, or, who may have called for his attendance during his absence or sickness, or in any other manner given it to be understood that he regarded the said physician as his regular medical attendant.

the general plan of treatment; to assume no future direction, unless it be expressly desired; and, in this last case, to request an immediate consultation with the practitioner previously employed.

§ 9. A wealthy physician should not give advice *gratis* to the affluent; because his doing so is an injury to his professional brethren. The office of a physician can never be supported as an exclusively beneficent one; and it is defrauding, in some degree, the common funds for its support, when fees are dispensed which might justly be claimed.

§ 10. When a physician who has been engaged to attend a case of midwifery is absent, and another is sent for, if delivery is accomplished during the attendance of the latter, he is entitled to the fee, but should resign the patient to the practitioner first engaged.

Of differences between physicians.—§ 1. Diversity of opinion and opposition of interest may, in the medical as in other professions, sometimes occasion controversy and even contention. Whenever such cases unfortunately occur, and cannot be immediately terminated, they should be referred to the arbitration of a sufficient number of physicians, or a *court-medical.*

§ 2. As peculiar reserve must be maintained by physicians towards the public, in regard to professional matters, and as there exist numerous points in medical ethics and etiquette, through which the feelings of medical men may be painfully assailed in their intercourse with each other, and which cannot be understood or appreciated by general society, neither the subject matter of such differences nor the adjudications of the arbitrators should be made public, as publicity in a case of this nature may be personally injurious to the individuals concerned, and can hardly fail to bring discredit on the faculty.

Of pecuniary acknowledgments.—Some general rules should be adopted by the faculty, in every town or district, relative to *pecuniary acknowledgments* from their patients; and it should be deemed a point of honor to adhere to these rules with as much uniformity as varying circumstances will admit.

Duties of the profession to the public.—§ 1. As good citizens, it is the duty of physicians to be ever vigilant for the welfare of the community, and to bear their part in sustaining its institutions and burdens; they should also be ever ready to give counsel to the public in relation to matters especially appertaining to their profession, as on subjects of medical police, public hygiène, and legal medicine. It is their province to enlighten the public in regard to quarantine regulations—the location, arrangement, and dietaries of hospitals, asylums, schools, prisons, and similar institutions—in relation to the medical police of towns, as drainage, ventilation, etc.—and in regard to measures for the prevention of epidemic and contagious diseases; and when pestilence prevails, it is their duty to face the danger, and to continue their labors for the alleviation of the suffering even at the jeopardy of their own lives.

§ 2. Medical men should also be always ready, when called on by the legally constituted authorities, to enlighten coroners' inquests, and courts of justice, on subjects strictly medical—such as involve questions relating to sanity, legitimacy, murder by poisons or other violent means, and in regard to the various other subjects embraced in the science of medical jurisprudence. But in these cases, and especially where they are required to make a *post mortem* examination, it is just, in consequence of the time, labor, and skill required, and the responsi-

bility and risk they incur, that the public should award them a proper honorarium.

§ 3. There is no profession, by the members of which eleemosynary services are more liberally dispensed than the medical, but justice requires that some limits should be placed to the performance of such good offices. Poverty, professional brotherhood, and certain of the public duties referred to in the first section of this article, should always be recognized as presenting valid claims for gratuitous services; but neither institutions endowed by the public or by rich individuals, societies for mutual benefit, for the insurance of lives or for analogous purposes, nor any profession or occupation, can be admitted to possess such privilege. Nor can it be justly expected of physicians to furnish certificates of inability to serve on juries, to perform militia duty, or to testify to the state of health of persons wishing to insure their lives, obtain pensions, or the like, without a pecuniary acknowledgment. But to individuals in indigent circumstances, such professional services should always be cheerfully and freely accorded.

§ 4. It is the duty of physicians, who are frequent witnesses of the enormities committed by quackery, and the injury to health and even destruction of life caused by the use of quack medicines, to enlighten the public on these subjects, to expose the injuries sustained by the unwary from the devices and pretensions of artful empirics and impostors. Physicians ought to use all the influence which they may possess, as professors in colleges of pharmacy, and by exercising their option in regard to the shops to which their prescriptions shall be sent, to discourage druggists and apothecaries from vending quack or secret medicines, or from being in any way engaged in their manufacture and sale.

Obligations of the public to physicians.—§ 1. The benefits accruing to the public, directly and indirectly, from the active and unwearied benificence of the profession, are so numerous and important that physicians are justly entitled to the utmost consideration and respect from the community. The public ought likewise to entertain a just appreciation of medical qualifications; to make a proper discrimination between true science and the assumptions of ignorance and empiricism—to afford every encouragement and facility for the acquisition of medical education—and no longer to allow the statute books to exhibit the anomaly of exacting knowledge from physicians, under a liability to heavy penalties, and of making them obnoxious to punishment for resorting to the only means of obtaining it.

PART FOURTH.

THE JURISPRUDENCE OF PHARMACY.

CHAPTER I.

LIABILITIES OF VENDORS OF DRUGS IN GENERAL, AND THE IMPLIED WARRANTY OF SOUNDNESS WHICH ACCOMPANIES SALES OF MEDICINES.

§ 175. The science of pharmacy, by its intimate association with the practice of medicine, forms an important chapter in medical police. The large field of instrumentalities with which it deals, whether of natural origin, or artificial preparation, undoubtedly meets a wider variety of necessities in civilization than belongs to any other avocation. If we examine the Materia Medica alone, we shall find that it comprises all alimentary substances—all natural medicines and poisons, and a very large proportion of all the pigments used in the arts; and if to this immense catalogue we add the artificial products of the chemical laboratory, already numbered by the hundred, and still increasing, all which substances fall *commercially* within the province of the pharmaceutist, we shall readily appreciate the fact that, aside from the general principles of law governing commercial transactions, the nature of

many of the products dealt in, and their beneficent or disastrous effects upon human health and life, imparts to such a traffic a far more important character than belongs to transactions in inert substances.

Long before the profession of pharmacy existed as a distinct branch of industry, the principle of responsibilty among men was graduated according to the relations of their avocations to health, life, reputation and property. Hence from remotest antiquity, pilots, physicians, and provision-venders as dealing with agencies dangerous to human life, have been held to a superior accountability for the careful practice of their calling. Out of this venerable principle of self-preservation have arisen those codes of medical police, which are the consummate fruit of mature civilization, and even where they do not exist in the form of positive enactments, the unwritten law of the land recognizes in its adjudications, the validity of the doctrine, by applying it to the case of dealers in substances capable of injuring health or life. Discussing the subject, therefore, under the light of the common law alone, we shall inquire first, into the liabilities of vendors of drugs in general, and the implied warranty of soundness which accompanies sales of medicines; second, the liabilities of manufacturing pharmaceutists for false representation as well as quality; and third, the liabilities of dispensing pharmaceutists for negligence, want of skill, or unauthorized publication of prescriptions.

§ 176. Drugs or medicines, as a marketable commodity, seem originally to have sprung from the field of provisions, among which, as is well known, are to be found many substances having a therapeutic as well as an alimentary

character. Hence, grocers or poticaries,[1] as they were synonymously called, formed one of the ancient companies of the city of London, until the year 1615, (13 Jac. I.) when, from the glaring mischiefs already seen to arise through the sale of improper medicines, the propriety of separating the apothecaries from the grocers' company became a matter of public necessity, and the king accordingly "grants that the apothecaries shall be separate from, and constitute a company distinct from that of the grocers, and free from their by-laws, regulations, jurisdiction and privileges. And, to promote the full dignity of the faculty of the pharmacopolites, before sunk into disrepute and despised, he grants to certain persons therein named, and all other persons educated in the faculty of pharmacy and practicing it, being freemen of the grocers' company, or of any other company of London, that they, and all such practicing within London, and its suburbs and seven miles around, shall constitute a corporation by the name of the master, wardens and society of the art and mystery of pharmacopolites of the city of London."[2]

Previous to this creation of a corporation of apothecaries, many of the grocers had doubtless familiarized themselves with both the nature and the composition of drugs so as to act as apothecaries proper to physicians,[3] and obtaining ac-

[1] The *apotheca* of the ancient Romans meant simply a store-house of any kind, and the word *apothecarius* a store-keeper. (*Vid.* Digest. lib. 19, 2, § 3, 11; and Code lib. 12, 58, § 3, 12). It is strange, therefore, that a word so notoriously improper, professionally speaking, as apothecary, should still be retained by graduates in pharmacy. It becomes only those who deal *in omnibus rebus, et quibusdam medicamentis.*

[2] General Statutes, Char. May 30, 13 Jac. I.

[3] Says Chaucer, in his character of the Doctor of Physic:

> "Ful redy hadde he his apotecaries,
> To send him drugges and lettuaries,
> For eche of them made other for to winne
> Hir friendship n' as not newe to beginne."

quaintance with the prescriptions of the latter often did administer them upon their own responsibility as practitioners of physic. Their right to do so was recognized by the House of Lords in the case of the College of Physicians against Rose,[1] and they still enjoy this privilege, taking nothing for their advice, but including a remuneration for skill and attendance in the price charged for their medicines.[2] On the continent the corporation of apothecaries was recognized much earlier than in England. In 1484, under Charles VIII. of France, several ordinances were passed bearing upon their rights and duties; these ordinances were further added to under Louis XII., in 1514; under Francis I., in 1516 and 1520; under Charles IX., in 1571; under Henry III., in 1583, and Henry IV., in 1598. Louis XIII. confirmed their ancient charters in 1611 and 1624, and in 1638 appeared the final statutes under which the corporation has ever since governed itself.[3]

§ 177. The code Napoleon makes a trenchant distinction between *apothecaries* and simple *druggists*, in the rights severally accorded them to deal in drugs. The former who are assumed to be pharmaceutically educated are alone allowed to sell *compounded* medicines,[4] the latter, who are mentioned in it along with grocers, are only permitted to

[1] 3 Salk. 17, H. T. 1703.

[2] Willcocks on Medical Profession, p. 19.

[3] Encyclopédie Méthodique, Art. Jurisprudence.

[4] But even then only upon the prescription of a physician or surgeon, viz.: "Apothecaries are forbidden to dispense or sell any medicinal preparations, or compounded drugs, except upon the prescription of a physician, surgeon or health officer, and over his signature. They shall sell no secret remedies. They shall conform in their preparations, which they shall compound and keep on hand to the formulas inserted in the dispensatories present or future. They are further forbidden to deal in the same place or shop, in any other articles than drugs and medicinal preparations." Code of Med. Police, Art. 32.

sell drugs of a simple character, in bulk and at wholesale.[1] In the United States, wherever statutes do not otherwise direct, apothecaries and druggists are put upon the common law footing of *provision vendors*, and may sell in any quantities, the articles in which they deal. For the right to dispose of property by sale or otherwise, is an incident of its ownership everywhere recognized as fundamental. But, like every other right conceded to individuals in civil society, it is always subordinated to the superior rights of *public safety*, and *public expediency or policy*. In obedience therefore to the supreme law of public safety, or the temporary and mutable necessities of public policy, the right of any person to dispose of his own property, by sale or otherwise, in open market, or through private contract, may be either restricted and abridged, or wholly suspended, *pro hac vice*. The moving consideration to these restrictions upon personal and proprietary rights must be sought for either in the inherently dangerous character of the property offered for sale, or the peculiar circumstances subsisting between the buyer and seller. The sale of poisons, diseased meat, unwholesome provisions, dangerous fireworks, or obscene publications, is an illustration of the former; the sale of arms, munitions of war, or provisions to a public enemy, of the latter.

This principle of restrictions upon the indiscriminate sale of certain articles dangerous in themselves, and

[1] And the following are the restrictions upon druggists: "Grocers and druggists are forbidden to sell any medicinal or compounded preparation, under a penalty of 500 francs. But they may continue to deal at wholesale in simple drugs, without, however, the right of selling any in medicinal doses." *Ibid.* Art. 33.

As to what constitutes a *medicinal* or *compounded* preparation, see the case of the four druggists in Rome, (reported in Merlin, Art. *Droguiste*,) where it was held, that *pulverizing* and selling pulverized chinchona bark was a violation of a similar article of the modern Roman code.

requiring, for their safe circulation among mankind, a suitable degree of knowledge, and caution in those dealing in them, is but the application, under another form, of the rule *salus populi suprema lex*, and as part of the internal police of a state, its wisdom has never been questioned. Hence, the right to sell may always be qualified by the obligation to sell in such manner as may be prescribed by law, and in no other, and any contravention of the enactment becomes a blow aimed at the public safety. The original act being unlawful in itself, intensifies the character of whatever injury may accrue from it, and may carry it by implication even into the domain of malice. "I take it," says Abbott, C. J., "that an act unlawful in itself and injurious to another is considered, both in law and reason, to be done *malo animo* towards the person injured."[1]

§ 178. Apothecaries at common law stand on the same footing as vendors of provisions for domestic use, and their contracts of sale carry with them an implied warranty of the good quality of the drugs sold. The articles in which they deal being of a specific character, and intended for a special purpose, the element of quality becomes an essential ingredient in their sale. And while it is an admitted fact that there are varying degrees in the idea of quality, it is the use, or teleological purpose for which the article is intended, which explains the limits within which that necessitated quality must be found. Hence, a medicinal substance become inert by time or decay, is not, legally speaking, a medicinal agent any longer, and can not be sold as such, without perpetrating a fraud upon the buyer. Likewise, an article which has undergone some form of chemical change, and is now charged with new and

[1] Duncan *v.* Thwaites, 10 E. C. L. R. 190.

dangerous properties, though sold under its ordinary name, is no longer the same article, in relation to accomplishing its wonted purpose, and its sale, unqualified by notice to the purchaser of its new character, is a fraud upon him. Undoubtedly a man may, if he please, purchase damaged provisions or drugs, but then, it must be shown that he did so understandingly, and with a full opportunity to ascertain their quality.[1] It is otherwise when he purchases them for the specific purpose of curing disease, and accomplishing a special purpose. There the rule of *caveat emptor* does not apply. For the pharmaceutist is bound to know, like the vendor of provisions, that the articles sold by him are sound, in other words, competent to perform the mission required of them, and being so presumed to know, warrants their good quality by the very act of selling them for such.

§ 169. It is in the interests of that public safety which overpeers all other considerations in human society, that an *implied warranty* of good quality always accompanies a sale of provisions for domestic use, and by parity of reason the same principle applies with still greater force in the case of *drugs* and *medicines*. And, while the vigor of this rule has been relaxed in the case of a sale of provisions packed, *inspected* and prepared for exportation *as merchandize*,[2] no similar exception has ever been recognized in relation to poisonous drugs.[3] For, when the risks to health and life arising from their impaired good quality, or

[1] This implied warranty must prevail in all cases in the sale of provisions; the party having an opportunity to examine the articles does not exempt the vendor from liability, unless the defect in the article be so palpable that the most unskillful and inexperienced can, from examination, or from inspection, easily detect it, or the purchaser, at the time, be informed of the defect, or the vendor informed that the article is wanted for other purposes than for food for man. Wright *v.* Hart, 18 Wend. 456.

[2] Chitty on Contracts, p. 392, Perkins' Ed.

[3] Moses *v.* Mead, 1 Denio, 378; Emerson *v.* Brigham, 10 Mass. 197.

their erroneous administration, whether as to substance or dose, are considered, it will be seen that a much higher responsibility necessarily attaches itself to the sale of such articles than belongs to provisions. The warranty of their good quality, therefore, arises, not by contract, but by operation of law, and out of the very nature of the substances themselves, since the value of drugs to the human economy depends essentially upon their good quality, and this latter becomes, consequently, the moving consideration to their purchase. Discussing these doctrines of warranty and representation in an analogical case, C. J. Shaw said, "in a case of provisions, it will readily be presumed that the vendor intended to represent them as sound and wholesome, because the very offer of articles of food for sale implies this, and it may readily be presumed that a common vendor of articles of food, from the nature of his calling, knows whether they are unwholesome and unsound or not. From the fact of their being bad, therefore, a false and fraudulent representation may be readily presumed.[1]

Applying this well-recognized principle of the common law to the case of apothecaries, it may be deduced that they are presumed, from the nature of their calling to know whether the drugs sold by them are sound or not. It is their duty in fact, *ex professo*, to be so informed, nor is it any answer to such omission that the buyer had opportunities for inspection and could judge for himself of the quality of the goods.[2] Says Mr. Chitty,[3] "in contracts

[1] Winsor *v.* Lombard, 18 Pick. 57.

[2] "So if I come to a tavern to eat, and the taverner gives and *sells me meat and drink corrupted*, whereby I am made very sick, action lies against him without any express warranty, for there is a warranty in law." (9 Henry, 6, 53.) Viner's Abr. vol. 1, p. 561.

[3] On Contracts, p. 393; Van Braclin *v.* Fonda, 12 Johns. 468; Marshall *v.* Peck, 1 Dana. 612; Osgood *v.* Lewis, 2 Har. & Gill, 495.

for the sale of provisions by dealers and common traders in provisions there is always an implied warranty that they are wholesome." It is plain that drugs are *special* articles as much as provisions for domestic use, and apothecaries special dealers in them. They are not common merchandize, and laymen are not presumed to be acquainted with them. And their soundness is so far a matter of *expertism*, as to exclude it from the field of ordinary commercial knowledge. Whence it flows that every sale of an article purchased for a specific purpose, and that purpose relating to health and life, carries with it *ipso facto* an implied warranty of its good quality. This principle has been so long settled in relation to provisions that it may be said to have passed beyond the sphere of discussion. And the same reasons founded upon security to health and life, which caused its recognition in the case of alimentary substances will, with much greater reason, support the analogical deductions which offer themselves in relation to drugs. Nor is it necessary to discuss the question whether such implied warranty is suspended in the case of one apothecary purchasing drugs from another, for it is plain that the substance purchased, and the purpose for which it is intended are the only points to be considered in the inquiry, it being immaterial who the purchaser is so far as the responsibility of the vendor is concerned.

§ 180. In a suit against a firm of druggists for negligence in using the same mill to grind Peruvian bark, through which cantharides had previously been passed, without subsequent cleansing, the court, in pronouncing judgment for the respondent, spoke as follows:

"If a man who sells fruits, wines and provisions, is bound, at his peril, that what he sells for the consumption

of others shall be good and wholesome, it may be asked, emphatically, is there any sound reason why this conservative principle of law should not apply with equal, if not with greater force to vendors of drugs from a drug-store, containing, as from usage may be presumed, a great variety of vegetable and mineral substances of poisonous properties, which, if taken as medicine, will destroy health and life; and the appearance and qualities of which are known to but few, except they be chemists, druggists or physicians. The purchasers of wines and provisions by sight, smell and taste, may be able, without incurring any material injury to detect their bad and unwholesome qualities; but many are wholly unable by the taste, or appearance of many drugs, to distinguish those which are poisonous from those which are innoxious, so close is their resemblance to each other; purchasers have, therefore, to trust the druggist. It is upon his skill and prudence they must rely. It is, therefore, incumbent upon him that he understands his business. It is his duty to know the properties of his drugs, and to be able to distinguish them from each other. It is his duty so to qualify himself, or to employ those that are so qualified, to attend to the business of compounding and vending medicines and drugs, as that one drug may not be sold for another; and so that, when a prescription is presented to be made up, the proper medicine, and none other, be used in mixing and compounding it. As applicable to the owners of drug-stores, or persons engaged in vending drugs and medicines by retail, the legal maxim should be reversed. Instead of *caveat emptor*, it should be *caveat vendor*. That is to say, let him be certain that he does not sell to a purchaser, or send to a patient, one drug for another, as arsenic for calomel, cantharides for, or mixed with snake-root and Peruvian bark,

or even one innocent drug, calculated to produce a certain effect, in place of another sent for, and designed to produce a different effect. If he does these things he can not escape civil responsibility upon the alleged pretext that it was an accidental or an innocent mistake; that he had been very careful and particular, and had used extraordinary care and diligence in preparing or compounding the medicines as required. Such excuses will not avail him, and he will be liable, at the suit of the party injured, for damages, at the discretion of a jury."[1]

§ 181. This doctrine, unless the word *drug* be syncopated from *medicine* as having a more comprehensive meaning, must, undoubtedly be qualified in its application so as to meet the case of wholesale vendors, who, selling articles not exclusively of therapeutic value, nor of an absolutely dangerous character to health or life, but such as are also consumed in the arts, though commercially denominated drugs; and selling them by sample, or under an inspector's brand in bulk, can not legitimately be held to the same measure of accountability as *dispensing pharmaceutists*. The wholesale dealer, in fact, occupies the same relative position towards the compounder and dispenser of drugs in medicinal doses, that general vendors of provisions *as merchandize*, do to vendors of provisions for domestic use.[2] Yet, when it comes to substances notoriously dangerous to health or life, the wholesale druggist stands on the same footing of responsibility as the retailing pharmaceutist, and impliedly warrants the articles to be as represented by their conventional designation, and if they are not so, is liable for all damages that may

[1] Hollenbeck *v.* Fleet & Semple, 13 B. Monroe, 229.

[2] Emerson *v.* Brigham, 10 Mass. 197; Winsor *v.* Lombard, 18 Pick. 57; La Neuville *v.* Nourse, 3 Campb. 351; Moses *v.* Mead, 1 Denio, 378.

ensue from his mis-representation.[1] At common law the selling of unwholesome provisions is indictable even in the case of a general dealer, because, as was justly said in one case, "*it is against the commonwealth.*"[2] But the authorities showing that an indictment will lie for selling unwholesome provisions confine the rule to cases where the sale is for immediate consumption by the purchaser. By parity of reason some distinction should be made (for a very important one certainly exists,) between substances which, though often used as medicines, are yet employed in large quantities for purposes of an entirely different character, and no absolute rule consequently can be equitably framed upon a foundation of liability constantly shifting *pro re nata*. The inquiry must be narrowed down, therefore, in the same way as with provisions, making the immediate consequence of the use of the article by the purchaser, to health or life, the standard by which to judge of the responsibility of the vendor.

[1] Van Bracken *v.* Fonda, 12 Johns. 468; Jones *v.* Murry, 3 Monroe, 85; Marshall *v.* Peck, 1 Dana, 609; Hart *v.* Wright, 17 Wend. 267; and 18 Ib. 456.

[2] Roswell *v.* Vaughan, Cro. Jac. 196; Roscoe's Cr. Evid. 340–5; 4 Blacks. Comm. 162.

CHAPTER II.

LIABILITIES OF MANUFACTURING PHARMACEUTISTS FOR FALSE REPRESENTATION AS WELL AS QUALITY.

§ 182. The profession of pharmacy, requiring for its most perfect exercise a laboratory, with suitable apparatus, for the preparation of the manifold articles of the materia medica, together with accomplished chemists to direct and superintend their manufacture, and the capital required for this branch alone of the art placing it beyond the reach of many otherwise competent apothecaries, there has sprung out of this divided necessity between means and manufacture two classes of pharmaceutists, viz., *manufacturing* and *dispensing*. Legally speaking, the former class include also the latter, and being the original introducers of many, if not most of the articles in the dispensing pharmaceutist's hands, they become, in common with provision vendors, as heretofore explained, warrantors of the good quality of the article, or of the correctness of its manufacture, when represented to be the product of a specific formula (known and adopted by the profession *eo nomine*) *at the time it leaves their hands*. But whether dispensing the article by the hundred-weight to a retailer, or the latter in his turn by the drachm to a consumer, each pharmaceutist warrants, first, *good quality in the article;* second, *correctness in kind;* and, third, *precision in following the formula represented by it.*

§ 183. In affixing a label to it bearing his name, and stating it to have been *prepared* by him, he makes his

warranty only the more notorious, and by so doing, inasmuch as it is an invitation to the public to confide in his representation, is ever after estopped from denying responsibility for any injuries which may have arisen out of defects in its quality, or errors in its composition. So long as the label in question remains attached to the article, it is an affirmation of its good quality and correct composition to each party who relies upon it when buying. For, although the purchaser be himself an apothecary, still, if he purchases on the credit given to the label, any false affirmation which it may convey becomes to that extent a *false representation*. Through how many druggists' hands soever it may have passed, there is a continuing liability on the part of the first vendor from which he can not escape.

§ 184. It is doubtless the fact that most articles deteriorate after a while, and it may be inferred from this that what is intended in relation to the liability of the vendor, applies only to the articles at the time they leave his hands. He only warrants their good quality then, but no longer. And his representation affirms that much, no more. Against the operations of time, he can not be expected to insure. For the limit of his responsibility as to possible changes, is the moment of parting with the articles. Hence, all that the law requires of him is, that they shall be what his label or representation affirms them to be. Any other apothecary purchasing of him may remove that label and affix his own name to the drug; but if he affirms it to have been "*prepared*" by him, in that case he steps into the place of his vendor, and renders himself liable to subsequent vendees for any damage sustained by the latter. But if the original vendor or manufacturer had been guilty of a wrongful act in the composition of the medicine,

whereby it became dangerous to the lives of others, the fact of a sale to a purchaser ignorant of this, although subsequently dispensing the particular drug over his own name, will not purge the former of his responsibility.

§ 185. These principles were fully discussed and satisfactorily expounded in a leading case in New York,[1] the facts of which, together with the law, are stated as follows in the decision of Ruggles, C. J.:

"This is an action brought to recover damages from the defendant for negligently putting up, labelling and selling as and for the extract of *dandelion*, which is a simple and harmless medicine, a jar of the extract of *belladonna*, which is a deadly poison; by means of which the plaintiff, Mary Ann Thomas, to whom, being sick, a dose of *dandelion* was prescribed by a physician, and a portion of the contents of the jar was administered as and for the extract of dandelion, was greatly injured, etc. Mrs. Thomas, being in ill health, her physician prescribed for her a dose of dandelion. Her husband purchased what was believed to be the medicine prescribed, at the store of Dr. Foord, a physician and druggist in Cazenovia, Madison county, where the plaintiffs reside.

"A small quantity of the medicine thus purchased was administered to Mrs. Thomas, on whom it produced very alarming effects, such as coldness of the surface and extremities, feebleness of circulation, spasms of the muscles, giddiness of the head, dilatation of the pupils of the eyes, and derangement of the mind. She recovered, however, after some time, from its effects, although for a short time

[1] Thomas *v.* Winchester, 2 Selden, 397.

One who does an illegal or mischievous act, which is likely to prove injurious to others, is answerable for the consequences which may directly and naturally result from his conduct, though he did not intend to do the particular injury which followed. Vandenburgh *v.* Truax, 4 Denio, 464.

her life was thought to be in great danger. The medicine administered was *belladonna and not dandelion.* The jar from which it was taken was labelled ½ lb. *dandelion, prepared by A. Gilbert, No.* 108 *John street, New York, jar* 8 *oz.* It was sold for and believed by Dr. Foord to be the extract of dandelion as labelled. Dr. Foord purchased the article as the extract of dandelion from James S. Aspinwall, a druggist at New York. Aspinwall bought it of the defendant as extract of dandelion, believing it to be such. The defendant was engaged at No. 108 John street, New York, in the manufacture and sale of certain vegetable extracts for medicinal purposes, and in the purchase and sale of others. The extracts manufactured by him were put up in jars for sale, and those which he purchased were put up by him in like manner. The jars containing extracts manufactured by himself, and those containing extracts purchased by him from others, were labelled alike. Both were labeled like the jar in question, as "*prepared by A. Gilbert.*" Gilbert was a person employed by the defendant at a salary, as an assistant in his business. The jars were labeled in Gilbert's name because he had been previously engaged in the same business on his own account, at No. 108 John street, and probably because Gilbert's labels rendered the articles more saleable. The extract contained in the jar, sold to Aspinwall, and by him to Foord, was not manufactured by the defendant, but was purchased by him from another manufacturer or dealer. The extract of dandelion and the extract of belladonna resemble each other in color, consistence, smell, and taste; but may, on careful examination, be distinguished the one from the other by those who are well acquainted with these articles. Gilbert's labels were paid for by Winchester, and used in his business with his knowledge and consent.

"The case depends upon the first point taken by the defendant on his motion for a non-suit,[1] and the question is whether the defendant, being a remote vendor of the medicine, and there being no privity or connection between him and the plaintiffs, the action can be maintained.

"If, in labeling a poisonous drug with the name of a harmless medicine, for public market, no duty was violated by the defendant, excepting that which he owed to Aspinwall, his immediate vendee, in virtue of his contract of sale, this action can not be maintained. If A. build a wagon and sell it to B., who sells it to C., and C. hires it to D., who, in consequence of the gross negligence of A. in building the wagon is overturned and injured, D. can not recover damages against A., the builder. A.'s obligation to build the wagon faithfully arises solely out of his contract with B. The public have nothing to do with it. Misfortunes to third persons, not parties to the contract, would not be a natural and necessary consequence of the builder's negligence; and such negligence is not an act immediately dangerous to human life.

"So, for the same reason, if a horse be defectively shod by a smith, and a person hiring the horse from the owner is thrown and injured in consequence of the smith's negligence in shoeing, the smith is not liable for the injury. The smith's duty in such case grows exclusively out of his contract with the owner of the horse, it was a duty which the smith owed to him alone, and to no one else. And although the injury to the rider may have happened in consequence of the negligence of the smith, the latter was not bound, either by his contract or by any consideration

[1] That the action could not be sustained, as the defendant was the remote vendor of the article in question, and there was no connection, transaction, or privity between him and the plaintiffs, or either of them.

of public policy or safety, to respond for his breach of duty to any one except the person he contracted with.

"But the case in hand stands on a different ground. The defendant was a dealer in poisonous drugs. Gilbert was his agent in preparing them for the market. The death, or great bodily harm of some person was the natural and almost inevitable consequence of the sale of belladonna by means of the false label.

"Gilbert, the defendant's agent, would have been punishable for manslaughter if Mrs. Thomas had died, in consequence of taking the falsely labeled medicine. Every man who, by his culpable negligence, causes the death of another, although without intent to kill, is guilty of manslaughter. (2 R. S. 662, § 19.) A chemist who negligently sells laudanum in a phial labeled as paregoric, and thereby causes the death of a person to whom it is administered, is guilty of manslaughter, (Tessymond's case, 1 Lewin's Cr. Cases, 169.) So highly does the law value human life, that it admits of no justification wherever life has been lost, and the carelessness or negligence of one person has contributed to the death of another. (Regina *v.* Swindall, 2 Car. & Kir. 232–3.) And this rule applies not only where the death of one is occasioned by the negligent act of another, but where it is caused by the negligent omission of a duty of that other. (2 Car. & Kir. 368, 371.) Although the defendant Winchester may not be answerable criminally for the negligence of his agent, there can be no doubt of his liability in a civil action, in which the act of the agent is to be regarded as the act of the principal.

"In respect to the wrongful and criminal character of the negligence complained of, this case differs widely from those put by the defendant's counsel. No such im-

minent danger existed in those cases. In the present case the sale of the poisonous article was made to a dealer in drugs, and not to a consumer. The injury, therefore, was not likely to fall on him, or on his vendee, who was also a dealer, but much more likely to be visited on a remote purchaser, as actually happened.

"The defendant's negligence put human life in imminent danger. Can it be said that there was no duty on the part of the defendant to avoid the creation of that danger by the exercise of greater caution? Or that the exercise of that caution was a duty only to his immediate vendee, whose life was not endangered? The defendant's duty arose out of the nature of his business, and the danger to others incident to its mismanagement. Nothing but mischief like that which actually happened could have been expected from sending the poison falsely labeled into the market; and the defendant is justly responsible for the probable consequences of the act. The duty of exercising caution in this respect did not arise out of the defendant's contract of sale to Aspinwall. The wrong done by the defendant was in putting the poison, mislabeled, into the hands of Aspinwall as an article of merchandise to be sold and afterward used as the extract of dandelion by some person then unknown. The owner of a horse and cart, who leaves them unattended in the street, is liable for any damage which may result from his negligence. (Lynch *v.* Nurdin, 1 Ad. & Ell. N. S. 29; Illidge *v.* Goodwin, 5 Car. & P. 190.) The owner of a loaded gun, who puts it into the hands of a child, by whose indiscretion it is discharged, is liable for the damage occasioned by the discharge. (5 Maule & Sel. 198.) The defendant's contract of sale to Aspinwall does not excuse the wrong done to the plaintiffs. It was a part of the means

by which the wrong was effected. The plaintiff's injury and their remedy would have stood on the same principle if the defendant had given the belladonna to Dr. Foord without price, or if he had put it in his shop without his knowledge, under circumstances which would have led to its sale on the faith of the label.

"In Longmeid *v.* Holliday, 6 Law & Eq. 562, the distinction is recognized between an act of negligence imminently dangerous to the lives of others, and one that is not so. In the former case the party guilty of negligence is liable to the party injured, whether there be a contract between them or not; in the latter the negligent party is liable only to the party with whom he contracted, and on the ground that negligence is a breach of the contract.

"The defendant, on the trial, insisted that Aspinwall and Foord were guilty of negligence in selling the article in question for what it was represented to be in the label; and that the suit, if it could be sustained at all, should have been brought against Foord. The judge charged the jury that if they, or either of them, were guilty of negligence in selling the belladonna for dandelion, the verdict must be for the defendant, and left the question of their negligence to the jury, who found on that point for the plaintiff. If the case really depended on the point thus raised, the question was properly left to the jury. But I think it did not. The defendant, by affixing the label to the jar, represented its contents to be dandelion, and to have been prepared by his agent Gilbert. The word 'prepared' on the label must be understood to mean that the article was manufactured by him, or that it had passed through some process under his hands, which would give him personal knowledge of its true name and quality. Whether Foord was justified in selling the article upon

the faith of the defendant's label, would have been an open question in an action by the plaintiffs against him, and I wish to be understood as giving no opinion upon that point. But it seems to me to be clear that the defendant can not, in this case, set up as a defence that Foord sold the contents of the jar as, and for what the defendant represented it to be. The label conveyed the idea distinctly to Foord that the contents of the jar was the extract of dandelion, and that the defendant knew it to be such. So far as the defendant is concerned, Foord was under no obligation to test the truth of the representation. The charge of the judge in submitting to the jury to the question in relation to the negligence of Foord and Aspinwall, can not be complained of by the defendant."

§ 186. Remembering at the outset that in the above case the article mislabeled was a notorious *poison*, it will be seen that the *negligence* of Gilbert in representing it as an innocent drug was an unlawful act in itself, which he could not purge himself from by alleging a similar negligence in Aspinwall and Foord. The court, it is true, did not express any opinion as to whether Foord was justified in selling the article upon the faith of the defendant's label, so that this question was left *sub judice*. It seems not inappropriate, therefore, to examine this point under the light of analogical reasoning. If we start with the principle that each vendor is liable to his immediate vendee for any injury which may be sustained by the latter through the bad quality of the drugs sold him, then it must inevitably follow that Foord was responsible to Thomas, since he was presumed to warrant in the usual way the articles sold by him. And if the drug originally correctly labeled had been subsequently parcelled out in a fresh jar, and then mislabeled by Foord, there would

plainly have been no ground of action against Winchester. But inasmuch as Foord was, like the defendant himself, a dealer in poisonous drugs, there does not seem to be any principle of warranty applicable to the one, which would not with equal justice apply to the other. Let us suppose even that Foord allowed the label with the words "*prepared by A. Gilbert*" to remain upon the jar in order to exonerate himself from liability for whatever quality of drugs it might contain, can it be said that such label was a notice to the public that they must look to Winchester, and not to him for a warranty of the good quality of the articles? Foord was unquestionably bound, as far as it was in his power, to know the quality of the articles dispensed by him. Winchester did not in fact manufacture the article in question, having purchased it from another, yet he was justly held liable, because he assumed responsibility by his announcement on the label of "*prepared by A. Gilbert*," his agent, which was, in legal acceptation, an express warranty that he both knew and vouched for the good quality of the drug. His false label was undoubtedly a continuing misrepresentation to Foord, and the original cause of the injury inflicted. And this being an unlawful act in itself, he became liable for all its immediate consequences. The jury found no negligence on the part of Foord or Aspinwall, and yet it can not be denied that both omitted to ascertain what it was their duty to know, for had Foord detected the error committed by Gilbert, he certainly would not have administered the poison to Mrs. Thomas; and had Mrs. Thomas died, Foord would, equally with Gilbert, have been guilty of manslaughter, since, whether he intended it or not, he was doing an unlawful act in dispensing a poison for a salutary medicine. While, then, it may be proper enough to rely upon labels and

warranties of others, in dealing with ordinary substances, still, when it comes to articles of a character dangerous to health or life, the law will presume knowledge of their quality in those professionally dealing in them, and exact a degree of skill and care commensurate with the risks incurred. Here it is *caveat venditor* instead of *caveat emptor*.

§ 187. The points presented by the counsel for the respondents form a connected series of legal principles, which touch, and illuminate the problem before us in so exhaustive a manner that we present them entire. The court followed in its judgment very closely in these steps, though necessarily without the same details in statement. The following was the brief:

"I. Affixing a false label to the poison, and sending it into market in that condition, so as thereby to mislead others and endanger human life, was an unlawful act, for which the defendant is responsible, whether he did it willfully or negligently.[1]

"II. To entitle the aggrieved party to sue in such case, no privity is necessary except such as is created by the unlawful act and the consequential injury, privity of contract being out of the question.[2]

"III. The injury is not rendered too remote to sustain a recovery because separated from the unlawful act by intervening events, however numerous, or of whatever kind, provided they are the natural and probable conse-

[1] 5 Maule & Selw. 198; 4 Denio, 464; 10 Eng. C. L. R. 190; 6 Hill, 292; 23 Eng. C. L. R. 52; 2 W. Blacks. 892; 19 Johns, 381; 3 Maule & Selw. 11; 11 Mass. R. 139; 17 Wend. 499; 5 Denio, 266.

[2] Grotius, B. 2, ch. 17, pl. 1; 1 Chitty's Gen. Pr. 12; 10 Eng. C. L. R. 190; 12 Mod. 639; 4 Denio, 464; 11 Price, 400; 35 Eng. C. L. R. 292; 6 Hill, 292.

quences of the act, *i. e.*, such as would be likely to follow, and might be easily foreseen.[1]

"§ 1. Where the unlawful act is in its nature likely to produce the very events which have followed, the author of it may be treated as having caused each succeeding event, though they consisted of the acts of third persons. *Causa causans est causa causati.*[2]

"§ 2. The false label was not only *likely* to mislead druggists and others into the mistakes which have followed, but such was its direct and almost inevitable tendency.[3]

"§ 3. The rule contended for does not extend the sphere of accountability to impracticable or unjust limits, but confines it to consequences so proximate as to be expected or readily foreseen, and for which every wrong-doer is and ought to be answerable.

"(1). If the defendant's act had been done *willfully*, he would have been chargeable with the consequences, including the mistake of Dr. Foord, etc., on the legal presumption that he intended them.[4]

"(2). *The sphere of responsibility* is the same when the wrong consists of *negligent* acts, though the measure of *indemnity and punishment* may be different.[5]

"§ 4. There is no pretense for saying that the injury

[1] 1 Smith's Lead. Cases, 132, n.; 23 Eng. C. L. R. 54; 5 Denio, 266.

[2] 19 Johns. 381; 4 Denio, 464; 2 W. Blacks. 892; Broom's Legal Maxims, 168, 1st ed.; 5 Maule & Selw. 198; 41 Eng. C. L. R. 425; 24 Id. 272; 23 Id. 52; 28 Id. 222; 12 Mod. 639; 19 Wend. 345; 4 Denio, 317; 2 Wend. 385; 3 Metc. 469; 2 Mees. & Welsb. 519.

[3] Cro. Jac. 471; 23 Eng. C. L. R. 41; 3 Metc. 469.

[4] 1 Grlf. Ev. § 18; 3 Maule & Selw. 14, 15; 3 Bouv. Ins. 348; 16 Wend. 649; 3 Met. 469.

[5] Archb. Cr. Pl. 421, 2nd ed.; 2 Ld. Raym. 1583; 23 Eng. C. L. R. 54; 3 Maule & Selw. 14; 1 Lewin Cr. Cas. 169; 2 Starkie Ev. 526, Am. ed. 1837; 5 Maule & Sel. 198; Broom's Legal Max. 168; 4 Denio, 464; 41 Eng. C. L. R. 422; 24 Id. 212; 19 Wend. 345.

was caused by the illegal act of a third person, and not by that of the defendant, the jury having directly found that the intermediate actors were not negligent.

"5. Besides, this rule never applies where the intervening wrong does not furnish a distinct right of action for the whole injury sustained. Mrs. Thomas could not get redress by an action *ex contractu* against Dr. Foord or any one else. And to apply the rule here would contravene the maxim *ubi jus, ibi remedium.*[1]

"6. Again, the rule does not apply where the intervening wrong, though actionable, is *the natural and probable consequence of the defendant's tort.*[2]

"IV. But the injury in this case was the *immediate* consequence of the defendant's act. The false label was a continuing representation or direction by him, and operated as the instantaneous cause of the mistake of Dr. Foord.[3]

"V. The inquiry being sufficiently connected with the defendant's wrongful act, it is no defence that he had parted with the poison under a *formal* sale, and placed it in the custody of others; this being the very mode by which he caused the injury.[4]

"1. The inability of the defendant to prevent the injury at the time, is not an excuse, but a part of the wrong.[5]

[1] 2 Crom. Mees. & Ros. 707–716; 38 Eng. C. L. R. 30; 11 Price, 400; 35 Eng. C. L R. 292; Broom's Legal Max. 91; 1 Smith's Lead. Cases, 124–132, n.

[2] 1 Smith's Lead. Cases, 132, n.; Broom's Leg. Max. 168; 5 Barn. & Cres. 356; 23 Eng. C. L. R. 52; 41 Id. 422; 24 Id. 272; 5 Maule & Selw. 198; 19 Wend. 345; 2 Mees. & Welsb. 519; 5 Denio, 266; 32 Eng. C. L. R. 211.

[3] Cro. Jac. 471; 23 Eng. C. L. R. 41; 3 Metc. 469; 1 Id. 193.

[4] 12 Mod. 639; 2 Starkie Ev. 526; Broom's Legal Max. 168; 5 Maule & Selw. 198; 41 Eng. C. L. R. 422; 24 Id. 272; 2 Mees. & Welsb. 519; 19 Wend. 345.

[5] 12 Mod. 639; 4 Denio, 311; 7 Mees. & Welsb. 456; 9 Barr, 345; 23 Eng. C. L. R. 52; 28 Id. 220.

"2. Besides, the label was a continuing authority or direction by the defendant for the use of the poison, and he was bound to indemnify against the acts which it was likely to cause when sold in that condition.[1]

"VI. The rule contended for by the defendant, that each vendor is liable only to his immediate vendee, has no application in the present case.

"1. This rule is founded on the principle that a right or duty *wholly created by contract*, can only be enforced between the contracting parties[2]. The case of Wright *v.* Winterbottom, 10 Mees. & Wels. 109, was decided on this principle, the declaration being expressly on a duty created by *contract* and not by *law*. In The Mayor, &c. *v.* Cunliff, 2 Comst. 165, each count was on an alleged duty *created by law;* but the law being void, the allegation as to the duty could not be maintained.

"2. Nothing was decided in either of the above cases which interferes with the right to maintain the present action. The duty violated by the defendant was not created by contract, but by law, every one being under an obligation to abstain from acts tending naturally and probably to endanger life. Besides, both cases contain dicta[3] which show that the principles on which the present action is based were not intended to be denied.

"VII. In any view of the case, the defendant, it must be admitted, is ultimately responsible for the injury to Mrs. Thomas, unless those who have been the unconscious agents of the wrong are to bear the burden, and *the author of it escape*."[4]

[1] Cro. Jac. 471; 12 Mod. 639; 23 Eng. C. L. R. 41; Id. 52; 28 Id. 220; 3 Metc. 469; 4 Denio, 311; 2 Comst. 180; 19 Wend. 345.

[2] 5 Mees. & Welsb. 283.

[3] 10 Mees. & Welsb. 114; 2 Comst. 180.

[4] 2 Saund. 150; Willes' R. 401; 2 H. Blacks. 350; 4 Wend. 492; Co. Litt. 348, a.

CHAPTER III.

LIABILITIES OF DISPENSING PHARMACEUTISTS FOR NEGLIGENCE, WANT OF SKILL, OR UNAUTHORIZED PUBLICATION OF PRESCRIPTIONS.

§ 188. In passing from the mere sale of drugs as a dealer, warranting their good quality, to the dispensing and compounding of them as a profession requiring skill and carefulness, the character of the apothecary changes essentially. In the former case he is simply a druggist or vendor of medicines, in the latter he becomes a dispenser or compounder, and, as such, allied in responsibility to the physician. In this new position his contract is no longer one simply of sale, but he passes into a mandatary for hire, like any workman who both furnishes materials, and subsequently, by the application of his skill. manufactures them into required articles. Skill, therefore, enters into the compounding of medicine to a degree commensurate with the nature of the service rendered, for pharmacy constitutes both a science and an art in itself, and its practitioners consequently incur all the responsibilities belonging to the discharge of professional duties.

To say that the apothecary or pharmaceutist is bound to possess the ordinary skill of his profession, is only to repeat what has heretofore been said in relation to the physician. And in compounding and dispensing his drugs, he is further bound to exhibit an amount of care proportioned to the risks and exposures of the business; and the degree required is higher necessarily where life or limb are

endangered, or a large amount of property is involved, than in other cases. This rule has always been enforced wherever the nature of the occupation carried on was such, as, through negligence might affect health. Thus, it has been held that if a baker directs his servant to make bread containing a specific quantity of alum, which, when mixed with other ingredients, is innoxious, but in the execution of these orders the agent mixes up the drug in so unskillful a way that the bread becomes unwholesome, the master will be liable to be indicted.[1]

In a recent case against a druggist's clerk, who was tried and convicted of manslaughter before the Court of Oyer and Terminer of Philadelphia,[2] for gross negligence in miscompounding a prescription, where, instead of furnishing *assafœtida*, as called for by the prescription, (which had been already compounded five or six times by the defendant and his father,) he supplied *atropia*, three grains being given in four pills, whereas *one-sixth* of a grain is the largest dose ever given for medicinal purposes, and the patient losing her life in consequence of taking the same.

Judge F. C. Brewster, in his charge to the jury, said: "We are of opinion that there is no question here of grades of crime, and on this account we shall not trouble you with the definitions of voluntary homicide, or of any higher offence. The District Attorney has, according to our views of the case, very properly abandoned the first count of the indictment, and the only question, therefore, is whether the defendant should be convicted or acquitted of the remaining six counts, which, in vari-

[1] 3 M. & S. 10; 4 Blacks. Comm. 162.

[2] Comm. *v.* Joseph H. Bower, Phila. Oyer and Terminer, April Term, 1869.

ous forms, charge the offence of involuntary manslaughter. This crime is thus defined: 'The doing of an unlawful act, not felonious, nor tending to great bodily harm, or doing a lawful act without proper caution or requisite skill, whereby one undesignedly kills another.' (3 Greenl. on Evid. p. 128.) The mixing of medicines for the relief or cure of the sick is clearly a lawful act. But the law requires that no person should attempt to deal out drugs as a matter of business or profit without competent knowledge or skill. So, too, he must not only possess knowledge and skill, but he should employ those attributes to the best of his ability, and failing herein, he should be held to a strict responsibility. We should, deal, however, with human nature as we find it, and hold no man liable as a criminal, unless he assume the duty of an employment knowing that he is incompetent to discharge its functions—or unless, possessing the proper information, he fail to employ it.

"The test, therefore, in such cases, lies in the word negligence. If a man wholly ignorant of the science of medicine and chemistry undertakes for profit to compound a prescription, and poisons another, he might be convicted of voluntary manslaughter. So, too, if ever so expert, he should undertake the same delicate employment, and mix the drugs in the dark, or while in a state of intoxication, and thereby cause death, this might be evidence of such gross negligence as would justify a jury in finding a wanton and reckless disregard of life; and here again the offence would be voluntary manslaughter.

"On the other hand, if the person compounding the prescription was a skillful druggist, and in a proper condition, but, by omitting some minor act of care, occasioned death, he would be guilty of involuntary manslaughter.

"And still again, if, without any fault or want of proper care, the wrong drug found its way into the medicine compounded, and death resulted, the act would be simple misadventure, and not indictable.

"It is the duty of the court, in these cases, not merely to state general principles, but to endeavor to assist the jury in the application of the law to the facts, which is, after all, the most difficult part of your labors. The defendant's counsel has admitted that the defendant made up this prescription, and there is no dispute of the fact that the taking of the pills caused the death of Mrs. Hecht.

"The sole question then is, did the defendant exercise reasonable care in the reading of the word called by the Commonwealth *assafœtida*, and in the compounding of the prescription? The case has very properly been so argued by the counsel on both sides. The Commonwealth contends that the word was plainly written—that the nature of the drug used was a warning to the defendant, and that a case of negligence has been made out against him. It is urged upon the other side that the word is not legibly written; that it might be mistaken for *atropia;* that the defendant has devoted many years to the study of his profession, and that he enjoys an excellent character for skill as a druggist and for peace as a citizen. You will have the prescription with you. You must examine it, and upon it and all the evidence in the case, ask yourselves this question: Did the defendant employ reasonable care in the preparation of this medicine? This involves two points: First, his reading of the word referred to; second, his knowledge of the deadly character of the drug he used. *For though he innocently mistook the language of the prescription, yet if the exercise of reasonable*

care would have warned him that he was preparing something which would inevitably kill, it would be criminal in him to go on.

"The inquiry, then, is not whether he put in the proper drugs, or made a mistake, for his default herein would not necessarily be crime. But the higher and truer test is the presence of reasonable care. A professional man does not insure those who deal with him against all contingencies. He simply contracts to use his skill and intelligence to the best of his ability, and with all due fidelity. Measuring him and his act by this standard, it is for you to determine the question of his guilt or innocence. If you find an absence of this reasonable care, you must convict the defendant upon the last six counts of the indictment. If you conclude that he was reasonably careful, or have a fair doubt of his guilt, you should acquit him."

While it is usually true, therefore, that a mandatary is only bound to observe ordinary care, yet, that term must be so qualified as always to be related *pari passu* to the transaction itself, and to rise and fall with it in varying degrees of specific excellence. "What is ordinary care," said Judge Thomas, "can not be determined abstractly. It has relation to, and must be measured by the work or thing done, and the instrumentalities used, and their capacity for evil as well as good. What would be ordinary care in one case may be gross negligence in another. We look to the work, its difficulties, dangers and responsibilities, and then say, what would and should a reasonable and prudent man do in such an exigency? The word 'ordinary' has a popular sense, which would greatly relax the vigor of the rule. The law means by 'ordinary care,' the care reasonable and prudent men use in like circumstances."[1]

[1] Cayzer *v.* Taylor, 10 Gray, 274.

§ 189. Inasmuch as apothecaries deal with the most dangerous instrumentalities, and upon their skill and experience may turn the chances of a human life, through the agency of such instrumentalities, it is only an equitable application of the above rule to place them upon a similar footing of responsibility with physicians or surgeons. This principle is fully set forth by Sir Wm. Blackstone,[1] in the following terms: "Injuries affecting a man's health are where by any unwholesome practices of another, a man sustains any apparent damage in his vigor or constitution. As by selling him bad provisions or wine; by the exercise of a noisome trade which infects the air in his neighborhood; or by the neglect, or unskillful management of his physician, surgeon or apothecary." And he finds its foundation in that passage in the civil law relatto unskillfulness in physicians, which stigmatizes it as a crime. "*Imperitia quoque culpæ adnumeratur, veluti si medicus idèo servum tuum occiderit quia malè eum secuerit, aut perperam ei medicamentum dederit.*"[2]

§ 190. The want of ordinary skill may be exhibited in a variety of ways, as, for example, in an ignorance of the language in which prescriptions are ordinarily written; in an ignorance of the laws of chemical combination and compatibility of substances; of the law of doses; of the means of determining the quality of drugs, and a consequent inability to judge of their actual condition and effects at any given time. All such short-comings in pharmaceutical attainments constitute a want of that ordinary skill which lies at the foundation of competency. They are a fraud upon the public to this extent, that they are a false representation of an existing state of facts in-

[1] 3 Chitty's Blackstone Comm. p. 91.

[2] Institutes, lib. IV, tit. 3, § 7.

tentionally designed to deceive, through the public announcement of himself as an apothecary, by a person all the while knowing his want of skill. No man is compelled to act as an apothecary, or mandatary of any kind, but when he does undertake so to act, he thereby engages with the public that he possesses the ordinary skill of his profession. *Spondet peritiam artis.* This principle has already been so fully discussed in the chapter on malpractice,[1] that we need only advert to it again, all the authorities there cited bearing with equal force *mutatis mutandis* upon the case of apothecaries. Thus, in Tessymond's case,[2] the prisoner, an apprentice to an apothecary, was indicted for manslaughter, in causing the death of an infant child, by negligently delivering laudanum for paregoric. There the laudanum and the paregoric bottles stood, side by side, and an expert testified that a person not very conversant might mistake one for the other. But Baily, J., said to the jury, "If a party is guilty of negligence, and death results, the party guilty of that negligence is also guilty of manslaughter." The apprentice was bound to know that the substance delivered by him was what it professed to be, and his inability to distinguish one label from another was a want of skill easily convertible into negligence. Semble also, that if a person not having a medical education, and in a place where medical men abound, administers a *wrong* medicine and death ensues, it is manslaughter, and the same judge, above quoted, said, "the party may not mean to cause death; on the contrary, he may mean to produce beneficial effects, but he has no right to hazard medicine of a dangerous tendency, when medical assistance can be obtained; if he does, he does it at his peril."[3]

[1] Supra, p. 70.

[2] 1 Lewin's Crown Cases, 169.

[3] Nancy Simpson's Case, 1 Lewin Cr. Ca. p. 262.

§ 191. Wherever statutory enactments exist for the better regulation of the science and art of pharmacy, its practitioners can exercise their calling only in obedience to prescribed regulations. Thus, in England, by the 5th section of 55 Geo. III., it is made the duty of an apothecary "to prepare with exactness and to dispense such medicines as may be directed for the sick by a physician lawfully licensed." And a penalty is imposed for not observing the directions of the prescription. So also, by the Code Napoleon, it is wisely ordered that pharmaceutists can dispense drugs only in obedience to special prescriptions, that is to say, prescriptions composed for each particular case, each individual patient. And it is a violation of law in them to follow dangerous formulas,[1] prepared in advance, and indiscriminately distributed. This is a blow successfully aimed at patent-medicines, and worthy of being imitated by our legislators, since, little or no attention seems to have been paid to the honorable and useful profession of pharmacy, which, as the hand-maid of practical medicine, has been most inexcusably neglected by the law-making power in the United States, when legislating upon subjects connected with medical police. But aside from special enactments, prescribing the mode of practice of pharmaceutists, their common law liabilities for malpractice, through either negligence or want of skill remain unchanged.

§ 192. The mis-compounding of drugs, or intentional deviation from the formula, as ordered in a prescription, is plainly enough a tortious act, since it is an act setting in motion a series of instrumentalities capable of doing injury, through ignorance or negligence at the start. For, if a party either does a wrongful act in itself, or a rightful

[1] Jour. du Palais, T. 43, p. 328.

one in a negligent, wrongful manner, whereby injury happens to another, such act being the proximate cause, the party committing the act may be liable for the injury.[1] "Negligence," says Mr. Hilliard,[2] "consists in the omitting to do something that a reasonable man would do, or the doing of something that a reasonable man would not do; in either case causing, unintentionally, mischief to a third party." And on this principle it has been held, that a printer was liable for negligently printing an advertisement to the injury of the advertiser.[3] The apothecary, as we have before shown, is bound to know the good quality of his drugs, and always warrants them to be such, but, besides this, he also impliedly warrants that they are compounded, in every prescription dispensed by him, *secundum artem*, by which is meant, according to a therapeutic, and not a literal interpretation.[4] For, should it happen that the prescription is wrongly written by the physician, it is the duty of the apothecary to have knowledge enough to detect it, and whether this be so in fact or not, he still compounds it at his peril. Since, although the physician who errs in a prescription is undoubtedly guilty of malpractice, the apothecary who compounds such a prescrip-

[1] Howe *v.* Young, 16 Ind. 312.

[2] On Torts, vol. 1, p. 124.

[3] Jackson *v.* Adams, 9 Mass. 184.

[4] This obligation of *rational* interpretation of prescriptions, is well recognized in the French code, where the pharmaceutist is made responsible for damages resulting from either negligence or imprudence in the preparation, or dispensing of drugs, whether by departing from the terms of a prescription, or closely adhering to one manifestly erroneous in character. Hence, a substance dispensed by him in poisonous doses under such circumstances, would subject him to penalties under both the civil and the criminal code. In other words, the right to sell is qualified by the obligation to sell in the manner prescribed by law, and in no other.

tion shares equally with him the guilt of his wrongful act. One man's negligence, or omission of duty, is no palliation of another's, and under the doctrine of joint liability, the apothecary who compounds, knowingly or not, a noxious prescription, commits a joint-tort with the physician who utters it. And this principle has been recognized in a recent case in Massachusetts, where a joint action was brought against a physician who prescribed it, and an apothecary who compounded a noxious medicine.[1] Nor, is there any escape for either party by showing a want of wrong intention, provided the prescription was noxious *ab initio*. It is the fact of negligence added to unskillfulness, which erects the action into a tort, and as such, it is presumptively intentional.[2]

§ 193. The trade of the pharmaceutist, although in every case a lawful one must still, from the dangerous nature of the substance in which it deals, be carried on with a degree of care commensurate with the character of those substances. Thus, in the case of one discharging arsenic, and other injurious matter from his works into a stream, which he might have avoided doing by certain expedients, it was held, that he could not defend himself by showing that his trade was a lawful one, carried on in a proper manner.[3] Pharmacy of all arts may be said, in fact, to require extraordinary care, if by that we graduate the care to the instrumentalities it deals with, and the pernicious consequences which may attend upon the slightest negligence, or omission of caution.

In the case of Hollenbeck *v.* Fleet & Semple,[4] plaintiff

[1] 2 Hilliard on Torts, p. 297, note *a*.

[2] Duncan *v.* Thwaites, 10 Eng. C. L. R. 190.

[3] Stockport, &c. *v.* Potter, 7 Jur. N. S. 880, and 31 L. J. Exch. 9.

[4] 13 B. Monroe, 229.

sued defendants in an action upon the case for having, through negligence, permitted a portion of the poisonous drug called cantharides to be intermingled with some snake-root and Peruvian bark, which he had purchased at their drug-store, said substances having been ground in the same mill in which the cantharides had been previously pulverized, without any subsequent cleansing of the same. Judgment was rendered against the defendants for $1,141.75 damages, whereupon they appealed from the same. The court above, in sustaining the judgment, said: "The rule as to the degree of care and diligence necessary to be used in certain cases to exempt a party from liability, and as to the extent or degree of negligence necessary to devolve civil responsibility upon the party guilty thereof, do not apply to the present and similar cases. It is absurd to speak of degrees of diligence and of negligence, as excusing, or not excusing, or as settling the question of liability or no liability, in a case where the vendor of drugs, being required to compound innocent medicines, runs them through a mill in which he knew a poisonous drug had shortly before been ground. If mistake or accident could excuse the sending of a medicine different from that applied for, which we do not admit, and can not readily conceive, there could have been neither mistake nor accident in this case, because the fact of the previous use of the mill was known to the vendors, and they are absolutely responsible for a consequence which that knowledge enabled them, and made it their duty to avoid.

"Even accidents or mistakes should not occur in a business of this nature, and they can not ordinarily occur, without there has been such a degree of culpable, if not wanton and criminal carelessness and neglect, as must de-

volve upon the party unavoidable, and commensurate responsibility. We were asked by the attorneys, in their arguments, with some emphasis, if druggists are to be, in legal estimation, regarded as insurers? The answer is, we see no good reason why a vendor of drugs should, in his business, be entitled to a relaxation of the rule which applies to vendors of provisions—which is, that the vendor undertakes and insures that the article is wholesome. Sound public policy in relation to the preservation of the health, and even of the lives of the people, would seem to require that this rule should have a rigid and inflexible application to cases similar to the one under consideration; as the responsibility of the defendants in this case does not depend upon the degree of care or diligence, or negligence used by them, but upon the naked fact, that when requested to compound a medicine for plaintiff to be composed *alone* of snake-root and Peruvian bark, the preparation sent to plaintiff contained also the poisonous drug, cantharides, which had been recently ground in the same mill, the taking of which caused him great pain, suffering and sickness, if it has not permanently injured his health."

§ 194. The gross negligence and wanton disregard of human health exhibited in the above case, amenable as it is to the severest censure, is but one in a large class of similar acts of malpractice by omission. Placing boys or incompetent persons in charge of drug-stores, or employing them in labeling medicinal preparations in manufacturing laboratories; may, in view of the substances compounded, labeled or dispensed by them, all be regarded as acts of gross negligence, unlawful in that they jeopardize human life, and under the ruling quoted in Duncan *v.* Thwaites,[1] would, in case of any injury resulting from

[1] 10 E. C. L. R. 190.

them, be considered as done *malo animo* toward the person injured. In the event of death ensuing thereby, the act of negligence would be converted into an offence against the state.[1]

UNAUTHORIZED PUBLICATION OF PRESCRIPTIONS.

§ 195. The discussion of a legal problem upon which no adjudications are to be found, and which may be considered as essentially a new one in the field of jurisprudential inquiry, may well cause hesitation and distrust in him who undertakes it. Yet, in the very order of things the *responsa prudentum* should precede the *res adjudicatas*, and until a principle is recognized to exist, not only *in foro conscientiæ*, but in natural reason and positive law, its en-

[1] "Even where the business is perfectly legal, negligence in the discharge of it when producing homicide, is manslaughter. Thus, the business of a physician or apothecary is undoubtedly legal, and yet, death resulting from negligence in the discharge of it, is undoubtedly, manslaughter." Wharton's Am. Cr. Law, § 1004.

As to responsibility for the consequence of *negligence*, resulting in injury, it matters not whether the apothecary be a wholesale or retail dealer, since the same obligation of care and caution rests upon him when dealing with noxious substances. And it has accordingly been held in an action against a manufacturing pharmaceutist, that "a dealer in drugs and medicines, who carelessly labels a deadly poison as a harmless medicine, and sends it so labeled into market, is liable to all persons who, without fault on their part, are injured by using it as such medicine in consequence of the false label.

"The liability of the dealer in such case arises, not out of any contract, or direct privity between him and the person injured, but out of the duty which the law imposes upon him to avoid acts in their nature dangerous to the lives of others. He is liable, therefore, though the poisonous drug with such label may have passed through many intermediate sales before it reaches the hands of the person injured.

"Where such negligent act is done by an agent, the principal is liable for the injury caused thereby." Thomas *v.* Winchester, 2 Selden, 397.

forcement will hardly be called for by those in whose behalf it can be invoked. Many wrongs undoubtedly exist for which no adequate remedy can be given, or the remedy may require such circuitous means, or such cumbrous machinery to secure it, as to have lost all practical value when obtained. And the knowledge of these facts often operates as a stimulus to the wrong-doer, and an obstacle to him who would otherwise seek for redress. It is to meet such cases that courts of equity are established, whose province it is to furnish, in the language of Aristotle, "*a correction of the law where it is defective by reason of its universality.*"[1] Under the shadow of such a system every right finds a sure and apt remedy—a recognition upon its appearance in court, and means to make itself respected. But for this, a large class of rights, particularly those of an incorporeal character, would find no forum in which to assert themselves; and the whole field of intellectual labors would be left at the mercy of any adventurer, who, seeing profit in the enterprise, might choose to appropriate to his own use the fruits of another's mental industry. Very often indeed this act of appropriation is done in entire ignorance of any proprietary right existing in another, for he may never have asserted it; or the right may relate to something which has become common to all men; or custom in a particular calling may have created an acquiescence in a course of conduct which, if legally investigated, might be shown to be originally founded in wrong, and perpetuated through ignorance. And if the doctrine that *communis error facit jus* can be pleaded in its behalf, then we are estopped from invoking any remedy. But that doctrine, it will be remembered,

[1] Eth. Nichom. lib. 5, cap. 10.

has been upheld in law only when the public good required it, and applies mainly to *forms*, and not to principles; to the external rule, and not the fundamental right or obligation; because it is against natural reason, and, therefore, against the ethics of law to assume, that, an erroneous principle can gather strength, or be dignified into a canon of right by lapse of time. On the contrary, the taint of wrong is incurable, and condemns everything into which it enters, whatever semblance of right or age it may wear.

§ 196. The separation of the practice of medicine from that of pharmacy has created legal relations between the members of these respective avocations which, although well understood and recognized in the legislation of most European countries have, as yet, received but little, if any, attention in our own. It is not in the purchase of drugs by physicians that these relations appear, for, in this respect, they stand, in their dealings with apothecaries, upon precisely the same footing as other persons. *But it is in the indiscriminate sale to the public of a combination of drugs originally formularized by a physician in a prescription intended for a particular person, and the consequent repetition of such prescription unauthorized by the writer thereof, that arises the moot question of the tort of an apothecary.* Formerly, when physicians dispensed medicines as well as gave advice, such legal questions could never have arisen, for the very elements out of which they are formed were absent. But, in the present day, and in cities at least, the exigencies of practice do not allow physicians the time necessary for compounding and dispensing drugs, nor if they had the leisure would it be well for them to undertake it, since pharmacy is a science by itself, to be studied and practiced specially like any learned profession, and can not be combined with the practice of medicine without detriment to perfection in either calling.

The pharmaceutist becomes, therefore, the adjunct of the physician in his practice, and subordinated to him in the dispensation of drugs under a formula invented by such physician. And while he may sell drugs generally, he can not invade the physician's proprietary right in the formula (if original). The problem arising out of these relations, and which offers itself to us for solution, lies midway of absolute and legal rights in literary property, and qualified rights of use and sale as an incident to all property. And, in order to discuss it, we shall be compelled to inquire first, into the legal character of a prescription; second, into the legal rights acquired in it by the patient, and third, into the legal relations of the apothecary to it. There is a very nice discrimination to be observed in these varying and commingling relations, but it will be seen, we believe, that in none of these changes of the aspect of the problem, is the right of either party merged into that of others. The distinct thread of right possessed by each, may be traced with legal precision throughout all the shifting obligations devolving upon physician, patient and apothecary, and if each would, in turn, correctly apprehend and discharge his duty to the others, no wrong could possibly arise in the premises.

LEGAL CHARACTER OF A PRESCRIPTION.

§ 197. Counsel or advice, as given by a physician or lawyer is an immaterial product consumed in its very production. Once uttered, it can not be recalled—*verbum demissum irrevocabile*—and the author, unless he is allowed a right of property in it, would be constantly remediless against those who, obtaining his counsel, might, afterwards,

refuse him a just remuneration for the service rendered. Whether this counsel be reduced to writing or not, it is, therefore, none the less the property of its author, and he may accordingly repeat it and re-sell it as often as he pleases; for, after all, he only disposes of the right of use to another, while the right of property, the absolute ownership, still remains in him. It is, undoubtedly, true that a retainer binds a lawyer not to give advice to a party opposed to his client in a particular suit, but it does not, and can not restrain him from giving advice to that same party, in any matter foreign to his client's interests in such action. In other words, he is not, without a special contract, universally retained, but particularly so *pro hac vice*. And his retainer is simply a premium to abstain from taking the other side, in some pending litigation with which, when over, he is no longer legally connected.

This surrender by a lawyer of his professional talents exclusively to one side in a judicial action, springs necessarily from the fact that in order to make a legal issue there must be two parties, one alleging and the other traversing. But as no similar reason, or even analogy exists in the practice of medicine, we may dismiss the exception above expounded as having no practical application to the subject under consideration. A physician, therefore, may give the same advice to different parties at the same time, and receive a fee from each for this service, without violating any obligation either moral or legal. And the patient on his part only pays for the usufruct of that advice, but does not, by so doing, create in the physician an implied obligation not to impart that same counsel to any one else who may call for it.

§ 198. Applying these principles to the question before us, it may be said that a prescription is so much professional

advice in the form of a private letter of instructions, for the compounding of certain drugs, intended to be used under specific conditions, relating to *time* and *persons*. These specific conditions form an implied contract between the physician and patient, consisting of two elements; first, that the prescription exhibits ordinary skill in its composition, and second, that it is, according to the best judgment of the physician, suited to the necessities of a particular patient at a particular time. The unities of skill, present or contingent pathological necessity, coupled with individual wants, must all reveal themselves in the prescription. For, the physician's reputation is involved as much in his prescriptions as in his treatment generally, of which, in fact, they form a most important part, and in case of a suit for malpractice, his ordinary skill will be tested no less by the one than the other.

LEGAL RIGHTS OF PATIENTS IN PRESCRIPTIONS.

§ 199. An original prescription, as a labor of skill, is a mental product like any kind of literary work, consisting of two parts, viz: *the paper and the formula*. Being written for the special use and benefit of the party who pays for it, the patient acquires a right of property at least in the paper, and may bring an action of detinue for it against any party who withholds it from him.[1] He has a *fiduciary ownership* in it, and, consequently, the right to its beneficial use, by virtue of purchase. And, in this respect, it differs in nothing from a letter, which the receiver has an undoubted property in, even as against the sender.[2] A patient should

[1] 3 Blacks. Comm. 151; Co. Litt. 286, b; Browne on Actions, 358.

[2] Oliver *v.* Oliver, XI. Common Bench Rep. N. S. 139; Eyre *v.* Higbee, 35 Barb. 509.

refuse to receive a prescription from a physician who will not sign it with his full name, for the refusal to sign, of itself, casts suspicion upon its merits, and in case of an error committed in its formula, or by the apothecary in compounding it, the signature is the best evidence of its paternity, and the best clue for bringing the error home to its author.

§ 200. But although, as has been already shown, the party paying for the prescription has an undoubted property in the paper, and a right to the personal *use* of the formula, it is clear that he acquires thereby no absolute property in the latter. That he may use it as often as he pleases can not be doubted, for the use is precisely what he has purchased and paid for. Yet, even in doing this, it must be remembered that no prescription, when dated, implies universality of use, or illimitability of time. It is only a quack who originates a prescription of a composite character for mankind in general, at all times, and in all places. The physician's liability for the result attending upon the use of the prescription terminates, with the occasion for which he specifically originated it. Hence, after the first use of the formula, the patient, unless he consults the physician, and receives his authority *de novo*, employs the prescription at his own peril.

Nor, again, does it follow from the right to use this latter that he can do it in any essentially different way, as by printing, or publishing it for example, any more than he could private letters, without first obtaining permission of the author, if a letter, and by parity of reason of the physician, if a prescription. This doctrine, as applicable to letters, was very thoroughly discussed in the case of the celebrated Chesterfield letters, and it has been frequently reaffirmed since.[1] The law has always entertained a tender

[1] Thompson *v.* Stanhope, Ambler's Rep. 737.

regard for literary property as such, esteeming it, though an immaterial product, something having a definite, tangible existence, with absolute rights attaching to it, and carrying with it all the incidents belonging to such rights. In this respect all literary property may be considered as standing upon an equal footing. Its ownership is as indefeasible a right as any other known to the law, and whoever invades it, does so at his peril. This ownership may be disposed of by sale, and assignment, or it may be bequeathed as any other interest in real or personal property.

§ 201. Considered, therefore, as literary property, the formula of the prescription still belongs to the physician, though he has sold its use to one or many patients. For, as a formula, it is a mental product belonging, as in the case of letters, and until specially disposed of, exclusively to the composer. This doctrine of the extent of ownership in literary property, underwent a very full discussion at the hands of Chancellor Walworth,[1] who affirmed substantially the same principles which had previously, and have been subsequently enunciated by both English and American courts. It is true, that the application of the doctrine to letters has been stripped somewhat of its vigor, in relation to the right of publication, whenever this is necessary to the vindication of the receiver's own rights or conduct, by a late decision,[2] but the general principle itself remains undisturbed. Following the analogy furnished us by these decisions relating to letters, we can apply it with slight modification to the case of prescriptions, and although without any special adjudications in kind to sustain our views, there can be little doubt of the parallelism of the two problems.

[1] Hoyt *v.* Mackensie, 3 Barb. Ch. R. 323.

[2] Woolsey *v.* Judd, 4 Duer, 379.

LEGAL RELATIONS OF APOTHECARIES TO PRESCRIPTIONS.

§ 202. We have already discussed the liabilities of pharmaceutists both as warrantors of the good quality of their drugs, as well as of that degree of skill impliedly possessed by their profession, and necessary for the safe and scientific compounding of the dangerous substances in which they deal. We are now about to enter an entirely new, and hitherto untrodden field of inquiry, and to investigate those other and more complex relations which subsist between them, physicians and the public, in the art of *dispensing* medicines. As a vendor of drugs, the apothecary undoubtedly can, in the absence of statutory restrictions, sell any of his wares to any one, in any quantity, and at any time that may suit him. This is a common law right inherent in property, or its holder, as incidental to its use. He can not be prevented from selling absolutely, unless the public safety is so liable to be compromised by any and every sale that it is against general policy to allow it. Aside from this, he may sell at discretion. But, on the other hand, and as part of the internal police of a state, he may be restrained from selling under particular circumstances (as in the case of poisons), and limitations may be put upon the exercise of his calling, precisely as upon others dealing in articles relating to food or health. Where those limitations do not exist, he may sell or compound drugs as he pleases, subject always to responsibility as any other vendor of similar wares. Whence it follows, that he contravenes no law, and infringes no man's rights in filling an order for drugs, however often it may be presented by the party owning the prescription, and, consequently, the right to use it. And

inasmuch as prescriptions are often without signatures of physicians, date or name of patient, without paternity in fact, or means of identification of ownership, the apothecary in originally compounding, or subsequently re-compounding the same, becomes simply the agent of the patient for supplying him, since, as is very generally the case, the patient deposits the prescription with him.

§ 203. Properly speaking, and looking at the question under the light of history, apothecaries grew out of the necessity of separating the science of prescribing or giving medical advice, from the science of compounding drugs. Both sciences are required to complete the act of treating the sick medically, and since the physician assumes the responsibility of the treatment, by giving directions specifically, both written as well as oral, while the apothecary is only called upon in the subordinate capacity of a purveying-assistant to him, it is clear that the physician always continues principal in the transaction of prescribing, and the apothecary acts as agent in supplying the remaining part of the treatment. In the formula of the prescription, if original, there is, as a mental product, a literary property belonging to its author, the use of which is sold, and consequently surrendered to the patient alone. It does not belong to the public any more than a letter, which, as has been heretofore shown, can not be published without authority of the writer.

The fact that a prescription has been once compounded and a copy of it, or the original, deposited in the hands of an apothecary, does not convert it into public property, which any one may use. A man may purchase a copy of a work, by doing which, he acquires absolute property in that copy to use it in all ways but one, and that is, to publish it without authority of its writer. He can own

that one copy absolutely, but he cannot multiply it indefinitely. Nor is it necessary that the work should have been printed or copy-righted, since there is property in MSS. and oral lectures, and they can not be published without authority any more than written compositions.[1] Whatever is original, as a mental product, is considered literary property the moment it is reduced to such form as admits of identification and proof of authorship.

§ 204. Under the shadow of these principles, it may be averred that a prescription is in law literary property. Nor is it the size or length of the composition which determines its character, for there may be property in a single sheet of music,[2] precisely as the laws of real property apply with the same force to a square foot of ground as they do to a square mile. If a prescription be property, the use of which the patient has purchased, it is only the patient who can ask to have it compounded. And as we have seen that this right gives him no authority to publish it, it follows as a necessary corollary, that the apothecary can not acquire any better right in the premises than belonged to the patient. The apothecary may undoubtedly make a copy of the prescription, to be used in case of necessity to vindicate his conduct in compounding it, and should, as a duty to himself and the public, not omit to do so, but he can not, legally, recompound it at will for any stranger or third party, since that would be equivalent to a publication of it without first obtaining permission from its author. Of course if the prescription has no signature, or no name of patient, it is simply an anonymous composition, which any one may appropriate, since there is no evidence of ownership. Whether it be good policy to

[1] Bartlett *v.* Crittenden, 4 McLean, 300.

[2] Clayton *v.* Stone, 2 Paine, 382.

compound such, is a question which we do not propose to discuss in this connection. In other countries, special enactments prescribe the duty of apothecaries in such cases, by forbidding the practice.

§ 205. But whether the original prescription, or a copy of it, be left with the apothecary, as soon as he has compounded it for the patient, his retention of the document becomes a bailment in his hands, in the nature of a deposit for the benefit both of the patient and the physician, the former having a legal and the latter an equitable right in it. The duty of the bailee being that of custody alone, his right of control extends only so far as this end can best be secured. If the manuscript composition of one person, or a copy of it, be simply deposited in the hands of another, the latter is made a custodian only, and for a specific purpose. Thus it has been held that a person who uses his own manuscripts for the purpose of instructing others, does not thereby abandon them to the public. Nor does he abandon them where pupils are permitted to take copies. Such copies being intended for the purpose of instruction, as used, can be applied to no other purpose.[1]

So, if the apothecary sell the use of the prescription to any third party without permission, it is both a breach of trust and an unlicensed publication of the same. Subtle and complex as these tri-partite relations may appear, they were not overlooked by the masters of ancient jurisprudence, and in the civil law the depositary was held to a strict account for any departure from the line of his trust. Hence, if any one having the custody of a will read it aloud in the presence of others, an *actio depositi* could be maintained against him; or, as Ulpian thought, an *actio injuriarum*, if he read the instrument to others

[1] Bartlett *v.* Crittenden, 4 McLean, 300.

with the intention of revealing the secrets of the testator.[1] If reading aloud to others a written instrument constitutes a publication, why is not a recompounding of a prescription indiscriminately for the public a similar act? It is no answer to this that the public are not made aware thereby of the formula, for perhaps even the patient and owner does not understand it himself. This is a contingency subsequent to the wrong committed, and of which the depositary can take no advantage. The only question to be decided in his behalf is, whether or not he has diverted the deposit from its original purpose of being used by one person, and surrendered it to be used by many.

§ 206. Whatever has been said upon the legal aspect of prescriptions when in the hands of apothecaries, applies necessarily only to such as are *original*. All formulæ which are to be found in the dispensatory, may be considered as *res communes*. Whoever may have invented them, they are now, from universal adoption, become public property. In England, formerly, the property in a Latin grammar was said to reside in the king; but more lately courts have held it to be a subject *publici juris*. The same rule will apply to ancient prescriptions, which may be considered as public property in every sense. Without desiring, therefore, to strain principles of law beyond their proper limits, nor to create problems for the mere purpose of discussing them, we have endeavored to investigate this vexed question in a judicial and not a professional spirit, and upon reviewing the principles of equity that have engaged our attention while examining

[1] "Si quis tabulas testamenti apud se depositas pluribus praesentibus legit, ait Labeo, depositi actioni recte de tabulis agi posse. Ego arbitror, et injuriarum agi posse, si hoc animo recitatum testamentum est quibusdam praesentibus, ut judicia secreta ejus qui testatus est, divulgarentur." Digest. lib. XVI. tit. III. § 24.

it, we think it will be made manifest that the interests of physicians and apothecaries are, in this particular, reciprocal and not antagonistic.

What is chiefly needed to protect the rights of all parties, and to provide for the public safety, is a system of rational and uniform legislation throughout the United States upon the profession of pharmacy. Strange as it may seem in a country where so many law-making bodies are each annually producing a volume of enactments, intended to meet all present and future necessities of, or to supply all past deficiencies in, municipal government—strange as it may seem, a science so intimately related to human health, and the preservation of life, as that of pharmacy, has as yet received legislative recognition in but a very few States.[1] On such subjects as poisons or alcoholic liquors, some statutes have indeed been passed prescribing the duties of apothecaries in their sale, but beyond this point State legislatures have not generally ventured, thus ignoring pharmacy as a science intimately allied to the practice of medicine, and recognizing it only as a traffic in drugs for commercial purposes.

[1] For a very able and exhaustive report on the present condition of the profession of pharmacy in the United States, see the Report of John M. Maisch, Esq., Permanent Secretary of the American Pharmaceutical Association, presented at its sixteenth annual meeting, September 10th, 1868, and published in pamphlet form. Philadelphia, 1868.

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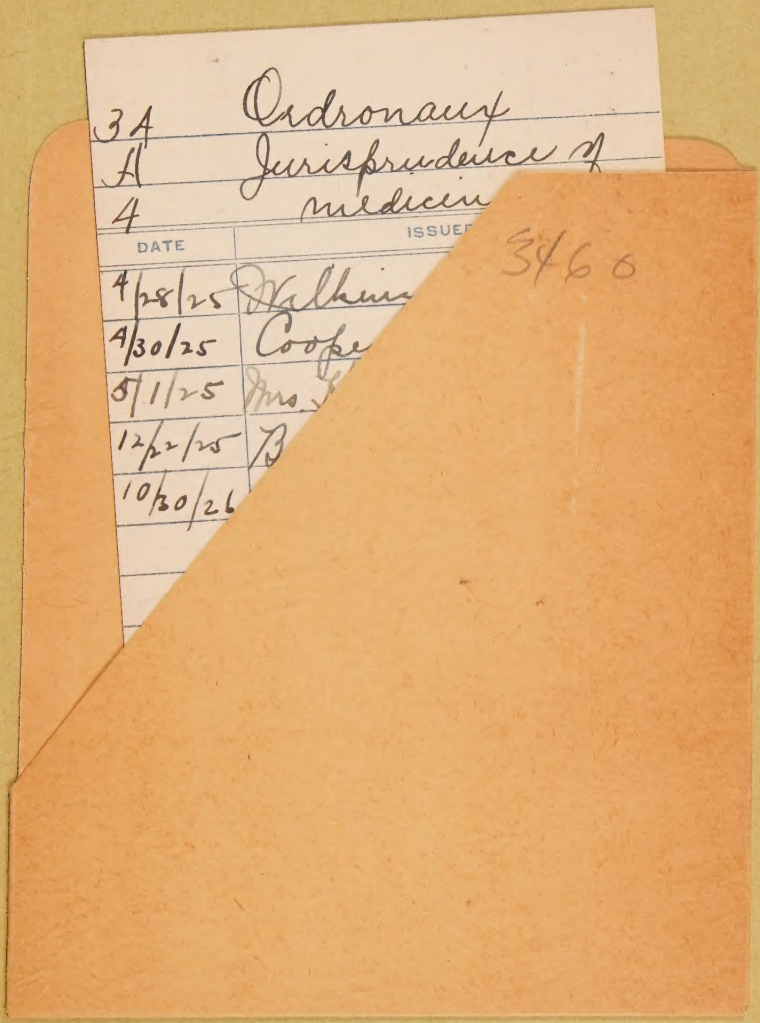
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